



CASES

ARGUED and DECREED

IN THE

HIGH COURT

OF

England:—

CHANCERY.

*Ut dicere laso
Ius populo possint, Injustitiamque mederi.*

The Second Edition, carefully corrected from the many
gross Errors of the former Impression.

To which are also added proper References to the Ancient and
Modern BOOKS of the LAW.

LONDON:

Printed by the Assigns of Richard and Edward Atkins Esqs;
for **John Walthoe**, and are to be Sold at his Shop
in Vine-Court, Middle-Temple. 1707.

CASES

ARGUED AND DECIDED

IN THE
40
6
12
134

HIGH COURT



CHANCERY.

For private possession, by the author's order.

The Second Edition, carefully corrected from the many errors of the first impression. To which are also added, from the author's and Modern BOOKS of the LAW.

LONDON:
Printed by the Author of *Black and White*, and sold at his Shop for *John Walker*, and are to be sold at his Shop in *St. Paul's Church-yard*, Middle-Temple, 1707.

Great Men, or Comparison with minor
Books of this kind. It is really the best
Understanding of this Nature yet extant, the
Reader will still find it more
reasonable he should take the Character
from the Book, it is less than from the
face.

TO THE READER.

PIECES of this Nature, how indifferent soever, have never yet missed a Favourable Acceptance: The very Want and Matter of them made them Welcome to the World, in spite of all the Disadvantages of a *Blunder'd Composition*, infinitely below the Dignity of *Chancery*, and short of that Excellent Language and Reason with which Cases are daily debated and decreed there. It is, doubtless, for the Honour of this Noble Court, its Proceedings should be known, as well as the Interest of Mankind to be instructed how they may be relieved against the *Trepans* of Deceit and Fraud in this Great Sanctuary of *Plaindealing* and *Honesty*. This, I hope, will make the *Usefulness* of the present *Publication* unquestionable, which is here offered to the World without *Encomiums* and *Flourishes* from the *Approbation* of

To the Reader.

Great Men, or Comparison with meaner Books of this kind. If it be really the best Undertaking of this Nature yet extant, the Reader will easily discern it; and 'tis more reasonable he should take the Character from the Book it self, than from the Preface.

A T A B L E O F T H E N A M E S O F T H E C A S E S.

A	
L ord Marquis of Antrim <i>against the</i>	Beversham <i>against</i> Springold 80
Duke of Buckingham, page 17	Sir James Bellingham <i>and others against</i>
Anonymous 11, 231, 232, 238, 241, 262,	Lowther <i>and others</i> 243
275, 307	Bishop <i>against</i> Bishop 40
Armitage <i>against</i> Metcalf 74	Bliscoe <i>against the Earl of</i> Banbury 187
Ashcomb's <i>Case</i> 232	Bor <i>against</i> Vandal 30
Ath <i>against</i> Gallen 114	Bolton <i>against</i> Arme 55
Sir Robert Atkins <i>against</i> Mountague 214	Bokenham <i>against</i> Bokenham 240
Earl of Athol <i>against the Earl of</i> Derby 210	Bovey <i>against</i> Skipwith 201
	Boynton <i>against</i> Sprigal 298
	Bluet a Dane <i>against</i> Bampfield <i>and others</i> 237
Ayre <i>against</i> Ayre 33	Brown <i>against</i> Vermuden 282
Ayloff <i>against</i> Fanshaw 300	Bush <i>against</i> Rishley 187
B	Barter <i>against</i> Bernard 224
B agg <i>against</i> Foster 188	Burges <i>against</i> Burges 219
Baker <i>against</i> Beaumont 32	Bulstrode <i>against</i> Lechmore 277
Baker <i>against</i> Shelbury 70	Butcher <i>against</i> Hinton <i>and</i> Short 302
Lady Backhouse <i>against</i> Middleton 173	Bullock <i>against</i> Knight 267
Barber <i>against</i> Took 193	C
Barn <i>against</i> Canning 300	C R. Colcot <i>against</i> Hill 15
Bawtry <i>against</i> Ibson 46	Clark <i>against</i> Lord Angier 41
Sir Henry Bellasis <i>against</i> Sir William	Carter <i>and others against</i> Church 113
Erwin 22	Chalfont <i>against</i> Okes 239
Sir Thomas Bennet <i>and others against</i> Box	Cary <i>against</i> Appleton 240
<i>and others.</i>	Chamberlain <i>against</i> Chamberlain 256
	Civil

A Table of the Names of the Cases.

Civil against Rich	309	Freak against Hearley	51
Clark against Danvers	310	Fleming against Walgrave	58
Crispe against B'ake	23	Fowle against Green	262
Crispe against Nevil	60	Freeman against Goodham	295
Copleston against Boxwel	1	Fry against Porter	138
Combs against Proud	54	Fuller against Lance	18
Cocker against Bevis	61	Frank against Frank	84
Colwel against Sir William Child	86		
Cornith against Mew	171	G	
Cox against Quantock	238		
Clotworthy against Mellish	279	Garfoot against Garfoot	35
Crofts against Wortley	241	Garfide against Ratcliff and others	292
Lord Cornbury against Middleton	208	Guilbert against Hawles	40
Cook against Bamphfield	227	Gilpen against Smith and others	80
Chute against the Lady Bacres	29	Gold against Canham	311
Churchil against Grover and others	35	Sir Henry Goring against Bickerstaff and others	4
Curtis against Smalridge	43	Goodrick against Brown	49
D		Glover against Portington	51
Lady Darcy against Chute and others	21	Gower against Bakingslals	86
Levy against Beardsham	39	Gore against Blake	98
Drake against the Mayor of Exon	71	Goddard against Complin	119
Davy against Davy	144	Grove against Banfon	148
Dakins against Berisford	194	H	
Davis against Curtis	226	Hampden against Brewer	77
Delamere against Smith	110	Sir John Harrison against Lord North	83
Degg against Osbalton	111	Hains and others Executors of Smithby, against Harrison and others Farmers of the Customs	105
Dennis by Sir Alexander Frazer her Committee, against Sir Thomas Badd and others	156	Hayes against Hayes	223
Dickenfon against Knowel	59	Sir Henry Hen against Sir Henry Conisby	93
Lord Digby against Langworth	68	Hele against Stowel	126
Digardine against Swift	71	Hide against Pettie	91, 184
Sir Joseph Douglass against Waad	99	Higgon against Calamy	149
Dodswel against Dodswel	261	Sir Francis Hill against Sir Rob. Car	294
Colonel Doyley against Perfoy	225	Hixon against Witham	248
Duncumban against Stint	121	Holtcom against Rivers	127
The Poor of S.Dunstant's against Beauchamp	193	Holloway against Collins	235
E		Hole against Harrison	246
Aton College against Beauchamp	121	Holland against Blandy	Ibid.
Edgworth against Davies	40	Holt against Holt	198
Erlwick against Bond	252	Holford against Holford	216
F		Hurst against Goddard	169
Ord Lord Grey against the Lady Grey and others	296		

A Table of the Names of the Cases.

Jacob *against* Thatcher 247
Jew against Thirkwel 31
 Jenkins *against* Kemis and others 103
 Jones *against* Dorie 39
 Jones *against* Lenthal 154

K

King *against* Brownlow 233
 Kinaston *against* Mainwaring 47
 Knipe *against* Jesson 76
The Lord Kennol against the Earl of Bedford and others 295

L

Lambert *against* Bainton 199
 Lawrence *against* Brasier 72
 Lee *against* Hale 16
 Leech *against* Leech 249
Mayor of London against Byfield 203
Mayor of — against Earl of Dorset 228
Love and others against Baker 67

M

Manning *against* Burges 29
March and others against Lee 162
Martin against Seymor 170
Maynard against Moseley 253
Martin against Douch 198
Merry against Abney 38
Moor against Mayhow 34
Morley against Elwayes 107
Moor against Grice 124
Moor against Blagrave 277

N

Nanny *against* Martin 27
Nelthrop against Hill and others 135
Needler against Deeble 299
Negus against Fettiplace 239
Nicholson against Sherman 57
Norcliff against Worsley 234
North against Crompton 196

O

Organ *against* Gardiner 231

P

Sir Jeffery Palmer, the Kings Attorney General, on the behalf of Jerome Smith a Lunatick, *against* Sir Robert Parkhurst and others 112
 — On the behalf of Woolrich a Lunatick, *against* Woolrich 153
 — On the behalf of the King and Trinity-College in Cambridge *against* Newman 157

Pawcy *against* Bowen 223
Pain against — 296
Parker against Palmer 42
Prat against Taylor 237
 — *against* Cole 128
Pate against Hatron 199
Palmer against Wettenthal 184
Papillion against Hix 256
Peerson against — 102
Pheasant against Pheasant 181
Phillips against Phillips 292
Lady Pridgeon against Pridgeon 117
Pit against Pelham 26
Pit against Pigeon 301
Pollard against Greenvil 10
Popham against Sir John Hobert 280

R

Randal *against* Rishford 25
Rand against Cartwright 59
Regnes against Lewis 35
Read against Hambey 44
 — *against* Read 115
Rennesey against Parrot 60
Rich against Jaquis 31
 — *against* Sydenham 202
Rofs against Rofs 171
Richardson against Lowther 273
Roscarrick against Barton 217

S

Sackvil *against* Dobson 33
Salisbury against Baggot 278
 Savil

A Table of the Names of the Cases.

Savil <i>against</i> Darcey	42	Lady Turner <i>against</i> Bromfield	307
Malpiece <i>against</i> Anguish	75	Giles Thornborough <i>against</i> Baker and others	283
Dr. Salmon <i>against</i> the Hamborough Company	214		
Sheldon <i>against</i> Weldman	26	V	
Seabourn <i>against</i> Blackstone	38	V Ashel <i>against</i> Vashel	129
Sewel <i>against</i> Freeston	65	Vanbrough <i>against</i> Cock	200
Sherley <i>against</i> Flag	68	Venables <i>against</i> Foyle	2
Sherman <i>against</i> Withers	152	Vanacre's Case	303
Seymour <i>against</i> Nosworthy	155	Verhorn <i>against</i> Brewin	193
Smith <i>against</i> Oxenden	25	Underwood <i>against</i> Staney	77
Smith <i>against</i> Pemberton	65		
Smith <i>against</i> Smoule	88	W	
Smith <i>against</i> Ashton	263	W An <i>against</i> Lake	50
Slingsby <i>against</i> Hale	122	Waller <i>against</i> Dalt	276
Smith <i>against</i> Palmer	133	Wallis and others <i>against</i> Sir Thomas Grimes and others	89
Stile <i>against</i> Martin	150	Washbourn <i>against</i> Downes	213
Stock <i>against</i> Denew	305	Weymberg <i>against</i> Tough	123
Squib <i>against</i> Bolton	186	West, Clerk, and divers other the Church-Wardens and Overseers of the Poor of Great Creceton, <i>against</i> Knight and his Wife, Executors of John Palmer	134
Smith and others <i>against</i> Stowel	195	Williams <i>against</i> Arthur	37
Scroop <i>against</i> Scroop	27	Williams <i>against</i> Owen	56
Scot <i>against</i> Rayner	50	Williams <i>against</i> Williams	252
St. Johns <i>against</i> Holford and others	97	Whitton <i>against</i> Lloyd	275
Stowel <i>against</i> Long	127	Wilmer <i>against</i> Kendrick	159
T		Willoughby <i>against</i> Pernic	304
T All <i>against</i> Ryland	183	Withers <i>against</i> Kelfea	189
Taylor <i>against</i> Debar	274	Wright <i>against</i> Coxon	262
Trevor <i>against</i> Perryor	148	Willstoncroft <i>against</i> Long	32
Thirveton <i>against</i> Collier	48	Woollet <i>against</i> Roberts	64
Tirrel <i>against</i> Page	262	Wood <i>against</i> Sanders	131
Tirwit <i>against</i> Gresham	73	Whorewood <i>against</i> Whorewood	250
Dr. Thorndike <i>against</i> Allington	79		
Thomas <i>against</i> Porter and others	95		
Trover <i>against</i> Hatfold	173		
Tanner <i>alias</i> Davis <i>against</i> Florence	359		

Also, That he would take his Money again with Damages.
And was strongly urged by the Plaintiff & Counsel to be
a Mortgage.

Church of the Defendant Counsel insisted, That it is
a Mortgage. That none can come to redeem a Mortgage when
the Mortgagee cannot compel the Payment of the Mortgage.
Money: for the Redeemor ought to be reciprocal: And
that the Defendant had no Money to pay the Mortgage.
It is a Mortgage, it is a Mortgage, it is a Mortgage, either by a
Condition in the Deed it self, or by another Collateral
Deed made at the same time: for the Condition ought to
be made and performed at the same time with the Deed.
And in the Plaintiff's Deed it was not said that
it was a Mortgage at all, but by agreement subsequent;
and this Deed, that was a Mortgage, and no more.
It is a Mortgage, it is a Mortgage, it is a Mortgage, either by a
Condition in the Deed it self, or by another Collateral
Deed made at the same time: for the Condition ought to
be made and performed at the same time with the Deed.
And in the Plaintiff's Deed it was not said that
it was a Mortgage at all, but by agreement subsequent;
and this Deed, that was a Mortgage, and no more.

Condition in the Deed it self, or by another Collateral
Deed made at the same time: for the Condition ought to
be made and performed at the same time with the Deed.
And in the Plaintiff's Deed it was not said that
it was a Mortgage at all, but by agreement subsequent;
and this Deed, that was a Mortgage, and no more.

And in the Plaintiff's Deed it was not said that
it was a Mortgage at all, but by agreement subsequent;
and this Deed, that was a Mortgage, and no more.
It is a Mortgage, it is a Mortgage, it is a Mortgage, either by a
Condition in the Deed it self, or by another Collateral
Deed made at the same time: for the Condition ought to
be made and performed at the same time with the Deed.
And in the Plaintiff's Deed it was not said that
it was a Mortgage at all, but by agreement subsequent;
and this Deed, that was a Mortgage, and no more.

CANCELLARIA.

Chief Justice Foster in absence of the
Chancellor.

Copleston against Boxwill.
The Plaintiff made an absolute Conveyance in
fee to the Defendant, by Lease and Release, of
Lands worth 1000 l. per ann, in consideration
of 1000 l. The Plaintiff at the making the
Conveyance had but the Reversion in fee ex-
pectant on an old Life, which shortly after died: the Plaintiff
then made Liberty to the Defendant. The Will was, That
the said Conveyance was a Mortgage, and that he might be
admitted to redeem. The Plaintiff was, That the Defendant
had said several times after the Conveyance, That he knew
not how long he should enjoy the said Lands; and had said
also,

also, That he would take his Money again with Damages. This was strongly urged by the Plaintiff's Counsel to be a Mortgage.

Remedy for the Mortgagor and Mortgagee ought to be reciprocal.

A Paroll Agreement after Conveyance, cannot make it a Mortgage, if not so at first.

Churchil of the Defendant's Counsel insisted, That it is a Maxim, That none can come to redeem a Mortgage when the Mortgagee cannot compel the Payment of the Mortgage-Money; for the Remedy ought to be reciprocal: And in this Case the Defendant hath no Remedy to enforce the Payment of this Money. And moreover he insisted, That if it were a Mortgage, it must be so à principio, either by a Condition in the Deed it self, or by another Collateral Deed made at the same time; for the Condition ought to be made and conceived at the same time with the Conveyance. And in the principal Case it was not said that it was a Mortgage at first, but by Agreement subsequent; and then he said, that was a nude Agreement, and no manner of Execution of it.

The matter by consent was referred to be determined in an amicable way.

The Lord Chancellor.

Chief Justice Foster.

Katharine Venables against Foyle.

Rep. Chanc. Part. 1. 178.

Assignment of a Mortgage, the Mortgagee ordered to account before Assignment, and after it.

Katharine Venables being a Tenant to Winchester-College of the Rectory of Andover, and indebted 700*l.* to the Defendant, agreed with him, that he should pay 400*l.* to the College for her, and that he should surrender her Lease, and take a new one in his Name; and it was also agreed, that she should for the first year of the new Lease hold the Premises, and pay the College their Rent; and if she did at the first years end pay the Defendant his 1100*l.* with Damages, the Defendant should assign to the Plaintiff. The first year effluxeth, and the Plaintiff neither paid the Defendant his Money, nor the College their Rent; and at three years end she permitted the Defendant to enter upon the Premises, and to enjoy them. Thereupon the Defendant exhibited a Bill to have the Plaintiff (then Defendant) redeem, or be foreclosed of Redem.

Redemption. She answered; and her intent thereby appeared to be, that the Plaintiff should satisfy himself by receipt of the Profits, and not to pay him. Whereupon the then Plaintiff (now Defendant) assigned the said Lease to Nicholas Venables, the Plaintiff Katharine her Son, in consideration of an Account made up between them two of what was really due to the Defendant on the Mortgage. This Assignment recited the said Suit by Foyle to have Katharine redeemed, and that his Interest was a Mortgage forfeited, and Nicholas Venables covenanted to indemnify Foyle against Katharine. This being the Case, Katharine exhibited her Bill for to be relieved against Nicholas Venables and Foyle, setting forth the Estate to Foyle to be (as it was) a Mortgage, and sought to be admitted to the Redemption against them both. Nicholas Venables pleaded several Outlawries against her, so that she could not proceed against him. Foyle he answer'd fairly, That he had assigned to Nicholas Venables upon his paying him what was due, and not more. This Case proceeded to an hearing against Foyle only, and in brevity the Case was no more, but that a Mortgagee assigns his Mortgage over for his due Debt. But it was much insisted by the Plaintiffs Counsel, That there was a breach of Trust in Foyle, and it was decreed that Foyle should account for all the Profits both before and after the Assignment, and pay the Overplus above his own Debt with Damages to the Plaintiff, and convey, and procure all claiming under him to convey to the Plaintiff, free from Incumbrances done by him and them. Afterwards Foyle not being able to perform this Decree, exhibited a Bill against Katharine Venables, setting forth a Fraud and Practice between them, and that he was willing to account unto the time of his Assignment, and to comply with the Decree as far as he was able, and prayed Nicholas Venables might come to an Account from the time of the Assignment and Recovery. Nicholas Venables exhibited a Bill against his Mother, claiming the Original Lease by a Title paramount hers; and at the hearing the said Causes about a year and half after, it appeared that Nicholas Venables had a Title to the Lease paramount his Mother; and Foyle was, upon hearing the matter, discharged of the Decree against him.

Outlawry pleaded.

A Mortgagee after Forfeiture assigns, and is decreed to account for the whole time, without the Assignee's being a Party.

A Bill to enforce to do an Act which the Plaintiff was formerly decreed to procure.

Decree avoided by Original Bill.

1 Roll's Abridg. 381. Z. pl. 1. Poff. 42.

D E

Term. Sanct. Hill.

Anno Regis 13 & 14 Car II.

I N

CANCELLARIA.

*The Lord Chancellor.**Foster Chief Justice.**Windham Justice.**Hales Chief Baron.*

Henry Goring Baronet, and others, Plaintiffs, against
Charles Bickerstaff and Elizabeth his Wife, John Ever-
field by his Guardian Dame Anne Alford Widow, and
John Alford by Dame Anne his Mother and Guardian,
Defendants. January 30.

Upon an Appeal, from a Decree made by the Master
of the Rolls, by the Defendant Dame Anne only.

John Alford deceased, being seized of the Manor of
Hams, &c. by Indenture dated 1, April 14 Car. 1. and
Fine thereupon, settles the same to the use of himself for
Life, the Reversion, as to part, to the use of Frances his Wife
for Life, for her Joynture, Reversion to his first, and to his
fourth Son in Tail, Reversion to Sir Edw. Alford his Bro-
ther for Life, Reversion to Sir Edward, and to his first and
all

all other his Sons, Reversion to his own right Heirs, under a Proviso, that it should be lawful for the said John and Sir Edward, when they should be solely seized of the Premises, or any part thereof, by virtue of any of the Limitations, at their pleasures to make Leases of the same, or any part thereof for one and twenty years, under what Rent they pleased. 7 Julij, 1643. John Alford made his Will, and thereby gave his Daughter Jane (the Defendant Eversfield's Mother) 600 l. To his Daughter Elizabeth (now Wife of the Defendant Bickerstaff) 500 l. to make her Portion 3000 l. and devised to her all his Messuages in White-Fryars in London, Pickhatch and Goswell-street in Middlesex, and in Wigonholt in Sussex, to her and to the Heirs of her Body, the Reversion to Sir Edw. Alford and his Heirs, provided that if Sir Edward paid Elizabeth 2500 l. at her Marriage, or at 21 years of age, which of them should first happen, the Estate to her to cease, and the Premises to remain to Sir Edward and his Heirs, and of his said Will made Frances his own Wife Executrix, and afterwards, pursuant to his power by the Indenture of 1 April, 14 Car. 1. by Indenture of the first of January, 1648. did demise to the Plaintiffs the greatest part of the Manor of Hams, &c. from Michaelmas then last past, for one and twenty years, under 10 s. yearly Rent, upon Trust, that they should permit said John Alford during his Life to take and receive the Rents, Issues, &c. of the said Manor; and upon further Trust, that after his death, Frances, his Wife, should receive the Rents, Profits, &c. in satisfaction of her Joynture, so far as the Premises by any former Assurance were liable thereunto, and to permit her, during her Life, if the Term so long continued, to receive out of the Residue of the Rents of the Premises 120 l. per annum, and certain Fire-wood and Faggots; and that the Plaintiffs should pay the said Jane Eversfield 50 l. per annum during the Life of her Husband; and should permit the said Frances his Wife, during her Life, if the Term so long continued, to receive the Residue of the Rents, during the Residue of the Term of one and twenty years, if she should so long live, to the intent she should pay thereout so much Money towards the Legacies of his Will, as his Personal Estate should be wanting to pay, and to pay the Residue to such person as the said John Alford should by his Will appoint; and for want of such nomination, to receive the same to her own use. And upon further Trust, that the Plaintiffs after
the

the death of Frances, during the residue of the term of one and twenty years, should permit such person and persons as the said John Alford by any Writing by him signed and sealed in the presence of two credible Witnesses, or his last Will, should nominate; and for want of such Nomination, or after the death of the Nominee, the Heir of the said John Alford to take and receive all and singular the Rents of the Premises: The said John Alford, by Deed the same first of January, 1648. signed and sealed in the presence of four credible Witnesses, thereby reciting the said Demise and Trust, did nominate and appoint the eldest Son of William Alford his Brother to have out of the Residue of the Premises 50 l. per annum, during the said term, and his two younger Sons 60 l. apiece, and the said Sir Edward Alford to receive the Residue of the Rents and Profits by the Trust of the said Demise limited to be paid to the said Frances, and after her death to take and receive the Residue of the Rents and Profits during the Residue of the said Term to his own use. It appeared by one Witness, that John Alford, three or four days before his death, which was before the Trust, and the Declaration of Trust, did acquaint that Witness that he had settled the Estate in Hams well, as he thought he could, and that his Brother Sir Edward Alford was by an Agreement between them to have all his Estate there after his death, and that he thereout appointed some Allowance to his Daughter Everfield, and declared that his Daughter Elizabeth (now Wife of the Defendant Bickerstaff) was not to have any thing out of his Estate there, for that he had otherwise provided for her. John Alford, the Night or the same Day the Demise and Declaration bore date, dyed without Issue male, leaving the Daughters his Heirs. Sir Edward Alford died intestate September 1653. The Defendant Dame Anne, his Relick, had taken out Administration; Jane, the Mother of the Defendant John Everfield, and whose Heir he was, dyed in the Life of Frances her Mother; Frances having proved John Alford her Husband's Will, dyed in 1659. having made the Defendant, Elizabeth Bickerstaff, Executrix. The Defendant Dame Anne, as Administratrix of Sir Edward Alford, Defendant; John Alford, as first Son and Heir of Sir Edward Alford, Defendant; Bickerstaff and his Wife, in her Right, she being one of the Co-heirs of John Alford, and Executrix of Frances who was the Executrix of John Alford; And John Everfield, as Heir to

to Jane, Co-heir with Elizabeth Bickerstaff, claimed the benefit of the Trust during the Residue of the one and twenty years after Frances her death; so the Plaintiffs being Trustees, ut supra, the Defendants all claiming the benefit of the Trust under several Titles, the Bill was to have the Defendants enterplead, and to desire the direction of the Court to whom the Trust belonged.

Upon the first hearing by the Master of the Rolls, 2 Novemb. 13 Car. 2.

Inasmuch as the Power reserved to John Alford by the Lease is, That after the death of Frances, the Trustees should permit and suffer such person and persons as he should nominate, and after the death of the Nominee, his own right Heirs to receive the Profits, &c. The Court was of Opinion, That John Alford had no power to nominate any person to receive the Rents, &c. but during the Life of the Nominee, and no longer; for after the Nominee's death, the Heirs at Law are nominated by the Original Deed to receive, &c. And when after by Deed Poll Sir Edward Alford is appointed to receive the Rents, that must be intended if he so long liveth; for the Deed Poll reciteth the Lease, and is in pursuance of the Trust therein; and that John Alford his intention in the Original Lease was plain, That after the death of the Nominee, his own Heirs should have the Residue of the Trust; and both the Deeds being executed at one time, are to be taken as one Assurance; and if he had meant the Heirs, Executors or Administrators of Sir Edward should have the remaining part after Sir Edward, he would have named them as well as Sir Edward; and for that the Interest of the Term was always in the Plaintiff, and never any real or legal Interest in Sir Edward, but as Nominee to receive the Profits, he being dead, the Trust to him ceaseth, and nothing passeth to his Heirs or Executors, but remaineth to Elizabeth the surviving Daughter, Heir and Executrix to John Alford, and the Testimony of that one Witness can be intended to relate to no other Settlement but the first by Deed and Fine, and not the Trust of the Lease, which was not in being when the said John Alford had the discourse with that Witness, but was made the day of his death; and that the Residue of the Term of one and twenty years doth belong to the Heir at Law of John Alford, who in a doubtful Case ought to be preferred, especially when it is so consonant to John Alford's inten-

Two Deeds of the same date touching one thing but one assurance.

Heir at Law to be preferred in a doubtful Case.

intention, and the Defendant Bickerstaff is also his Executrix and Daughter, and doth therefore order and decree the same accordingly, and that the Rents arrear and for the future be paid to the Defendant Bickerstaff during the Coverture between them, and after to the Defendant Elizabeth Bickerstaff during the Residue of the Term.

And upon the Appeal, the Question was upon the whole Case, Whether John Alford had Power to dispose of the Trust of the whole Term of one and twenty years after the death of Frances; and how far he had Power to dispose of it; and whether there were not a Restriction by the Limitation of the first Deed to the Heirs after the death of the Donor, that did disable his disposition thereof farther, except to his Heirs; and whether John Alford had disposed the whole Term or not; and which of the Parties ought to have the Remainder of the Trust?

Executory Devise.

Perpetuity.

Limitation in Reversion to several persons in being doth not tend to the creation of a Perpetuity, but otherwise if it be to a person not in being.

The Trust of a Possibility is assignable or declarable.

On a void Limitation the Estate reverts to the Limitor.

Limitation of the Trust of a Term to one, good to his Executors.

The Counsel of the Defendant Bickerstaff now offered farther, That John Alford had no Power, after two distinct Limitations to two several persons, to limit it to a third after the death of the second, because it would make an Executory Devise upon an Executory Devise to tend to the entailing of a Chattel, and creating a Perpetuity; and that the Limitation of John Alford was out of the Power and Trust, and not of any Interest in the Reversion of the Term. They did all agree in one uniform Opinion, That the Limitation of a Term to several persons in Reversion one after another, if those persons were in being, and particularly named, could in no wise tend to the Entail of a Chattel, or Creation of a Perpetuity; but limiting of it to a person not in being, did: And that where any person had the Trust of a Possibility in Remainder of a Term, he had good Power to declare and make a disposition of the Trust of such Possibility; but that the Limitation of such Remainder in Possibility of a Chattel Real to the Heir of the person limiting, was a void Limitation, and the Estate in Interest did again revert to John Alford, who made that Limitation; and he having by the Deed Poll the same day of the Lease, which was made pursuant to the Power of the first Settlement, limited to Sir Edward Alford the whole remaining Term after the death of Frances, without any other Limitation or Restriction, which he might easily have done (if so intended) the same was a good Limitation of it to Sir Edward, his Executors and Administrators; and if the Power in John Alford had been defective,

feative, his Interest ought to come in aid, and supply it, The Interest of the Litor is to supply his Power if that be defective.

to make good such Limitation, for otherwise there would be no disposition at all of the remaining Term, and the Legacies of 50 and 60 l. to William Alford's Children would be avoided, and the Interest in the remaining Term might be pretended to be in the Trustees, and they claim the Estate discharged of the Trust, there being nothing to oppose the Power or Intention of John Alford in limiting the whole Remainder of the Term to Sir Edward, but the implicated, misplaced, and mistaken expression of the Lease. The whole Court was clear of Opinion, That the former Decree was grounded upon a mistaken foundation; and that taking both Deeds together, no other equitable or reasonable Interpretation can be made thereof, but that according to the Power, Interest and Intention of John Alford, who it appears by one Witness never intended the Estate to whom it was decreed by the former Decree, the whole remaining Term in the said Lease, and Trust therein after the death of Frances, for the Residue was well limited and appointed to Sir Edward Alford, his Executors and Administrators; and that the Defendant Dame Anne is well entitled thereunto: And both order and decree, That the former Order and Decree be discharged; and that the Plaintiffs shall come to an Account for, and pay the said Dame Anne the Rents and Profits of the said Manor which are in arrear and so grow due until the expiration of the Remainder of the said Term of one and twenty years, and convey to her for the Residue of the Term, if so required; and in so doing shall be protected and saved harmless by the Authority of this Court. Vide Moor's Rep. 809. Torton contra Mollineux. 1 Co. Rep. 156. 3 Cro. 577. 10 Co. 47, 48, 52. And quare, Why the Trust of a Possibility in the Remainder of a Term is disposable over, and the Possibility in Interest in the Reversion of a Term is not assignable. Vide 8 Co. Rep. 96.

The Lord Chancellor.

The Master of the Rolls.

Chief Justice Hyde.

Justice Twisden.

Pollard against Greenvil.

*Rep. Chanc. Part 1.
114.*

A defective Execution of a Power made good in Equity.

The Plaintiff lent the Lady Greenvil 100 l. and one Culliford, as her chief Agent and Friend, became bound for the same; And the Lady having Power to make a Lease in Possession for one and twenty years of her Estate, makes a Lease to Culliford for one and twenty years, to secure him from the Debt aforesaid, and several other Debts he was engaged for the said Lady; but the Lease was made to commence from a time to come, which was void in Law, in respect her Power was but as aforesaid; and Culliford had the Possession for some time, but was afterwards ousted by force by the Lady's husband; but her husband not long afterwards dying, she enjoyed it for the Remainder of the Term; and Culliford being dead, and leaving no Assets, the Plaintiff therefore preferred his Bill here for the Debt aforesaid. But for that it appeared to the Court that the Money was employed for his use who created the Trust for payment of Debts, and she having received the Profits for thirteen years, and for that the Lease was not good in strictness of Law, yet the Court was satisfied that the same did amount to a good Declaration of her Power in Equity to make the Lease for one and twenty years in being, and that the Receipts of Profits was also under that Power, and subject to the Trust: And although the Defendant did set forth by Answer, that Culliford at the time of his death was indebted to her, yet the Defendant was decreed to pay the Debt.

D E

Term. Sanct. Trin.

Anno Regis 14 Car II

I N

CANCELLARIA.

The Lord Chancellor.

Anonymus.

Upon a Demurrer after Trinity Term, 14 Car. 2.
1663.

THE Bill was barely to discover a Deed. The Defendant demurred, because the Plaintiff had not made Oath, according to the course of the Court, that he had not the Deed.

Serjeant Glyn for the Plaintiff insisted, That the Oath was not required by the course of the Court in this Case; and he took this difference, That when the Bill alledgeth the want of a Deed, and seeketh to be relieved upon the Matter of that Deed by a Decree, there such Oath is necessary: but where the Bill seeks no Decree, but barely to have the Defendant discover whether he hath such Deed or not, or to have the Deed produced at a Trial: in that Case the Plaintiff ought not to be put to his Oath, for it is not to be presumed the Plaintiff would exhibit a Bill in either of the latter Cases, if he had the Deed. This difference was well approved of by the Lord Chancellor, and thereupon the Demurrer over-ruled.

Whether it beho-
veth that the Pl.
make Oath of the
want of a Deed,
where not.

E D

Sir Thomas Bennet and Sir William Brownlow, *Knts.*
Plaintiffs, against Mary Box, Relict of Henry Box, and
Daughter of Ralph Allen, Walter Stonehouse, Son and
Heir of Elizabeth Stonehouse, another of the Daugh-
ters of Ralph Allen, George Burdet, Son and Heir of
Martha Burdet, another of the Daughters of Ralph
Allen.

M I

ANd 15 Jac. Ralph Allen purchaseth Lands in his own Name, and in the Name of Edward Hammond, in Trust for Ralph Allen and his Heirs, and Hammond to take nothing thereby: But the Trust is not expressed in the Conveyance. William Allen Senior did borrow 600 l. of John Bennet, and the said William Allen, Ralph Allen, and William Allen Junior, Son and Heir of the said Ralph Allen, (William Allen Senior being first bound in the Bond) 1630. did become bound unto the said John Bennet, since deceased, for the payment of the said 600 l. by Bond of 1000 l. wherein they bound themselves and their Heirs, under whom the Plaintiffs are well entitled to the Debt in question. And one Witness deposeth, That Ralph Allen was a good Husband, not one that contracted any Debts of his own, and believes he and William Allen Junior were only Sureties for William Allen Senior. Ralph Allen dies, and Hammond survives, and after dies; then William Allen, Son and Heir of Ralph Allen, dyeth without Issue, and the now Defendants, as Heirs at Law, bring their Bill against the Heirs of Hammond, who had the Estate in Law, to have the Lands conveyed in performance of the Trust; which is decreed to them accordingly, and the Lands conveyed unto them as Heirs at Law of Ralph Allen.

The now Plaintiffs bring their Action of Debt at Law against Henry Box, since deceased, and the now Defendants as Heirs of Ralph Allen. The Defendants thereunto pleaded Riens per discent præter a third part of a Messuage, worth 6 l. 13 s. 4 d. per annum.

January,

January, 1662. the now Plaintiffs bring their Bill in this Court against the Defendants, and Henry Box, the Defendant's late husband, who had the Lands decreed and conveyed unto them as Heirs of Ralph Allen, to have them decreed as Heirs, to pay the just Debts of Allen, or to have the said Lands made liable to pay the said Debt as Assets in Equity.

The Defendants, Box and Stonehouse, pleaded, That the said Action still depended, which is a double veration; and demur, and demand Judgment. Whether they, as Heirs, shall be charged in Equity, without any Trust or Agreement further than the Law chargeth them?

On hearing thereof, a Case was stated on the Bill, Plea, and Demurrer; and afterwards Henry Box died. And before any Bill of Revivor against the Defendants, it was ordered, May 12. 1653. That the Defendants do answer the Plaintiffs Bill; but the benefit of the Plea to be considered at the hearing.

The Defendants deny that they have entered into, or received any of the Profits of the said Lands, the same being ever since 7 Car. extended for the Debts of Ralph Allen, and ever since held by Sir John Banks and his Executors, and formerly before the Extents were let at 500 l. per annum, and after at 300 l. per annum, and now but at about 400 l. per annum, and whereout above 60 l. is deducted for the Charges of the Sea-Banks, and the rest will not pay the Interest of the Principal Debt, as the Extensors alledge.

An Original was filed by the Plaintiffs against Henry Box and the other Defendants on the Bond in question in the Common-Pleas, bearing Teste 16 Feb. 1659.

The Defendant Walter Stonehouse did for 400 l. bargain and sell his third part of the Reversion in Fee of the Lands in question to Henry Box deceased, by Deed bearing date 3 Octob. 1660. and the said Henry paid then to the said Walter the 400 l. Purchase-Money for the same, and the Defendants, as they swear by their Answer, had not then, or in some months after, any notice of the said Original, and no Notice proved; and one Witness deposeth he believeth there was no Notice; for he being conversant in all Mr. Box's Affairs, if there had been any Notice, he should have heard of it, as he verily believes.

The Defendant George Burdet, after the other Defendants were ordered to answer, put in his Answer, and there.

thereby insisted on the same matter the other Defendants did by their Plea and Demurrer, and was on June the 9th last past served with Process ad audiendum Judicium upon 21 June following, but appeared not at the hearing, or any for him,

1. Question. Whether the said Lands, as this Case is, shall or ought to be decreed as Assets in Equity?

2dly. Or whether the Plaintiffs ought to have any Decree in this Case against the Defendants?

Trust Lands no
Assets in Equity,
altho' the Trust
be decreed in
Equity.

Chief Justice Hyde, Chief Baron Hales, and Justice Windham, were of opinion on hearing Counsel on both sides, That the Lands in the said Case and Bill mentioned (as the Case is stated) are not, nor ought to be decreed as Assets in Equity, and that the Plaintiffs ought not to have any Decree against the Defendants.

Afterwards in Hillary Vacation, 1664. the Bill was dismissed upon the Judges Certificate, 14 Novemb. 1660. or 1661. in a Case wherein Clark was Plaintiff against Sir Thomas Fanshaw.

DE
Term. Sanct. Mich.

Anno Regis 14 Car. II.

IN
CANCELLARIA.

The Lord Chancellor.

The Master of the Rolls.

Dr. Coldcor against Hill and others.

THE Case was to this purpose: Dr. Coldcor having purchased Church-Lands in Fee under the Title of the Surper (during the Rebellion) sold the same in Fee to the Defendants Cestator, and covenanted that he was lawfully seized, &c. The Church being restored, and the Estate voided, the Covenanters sued the Covenant, and recovered Damages to the value of the Purchase-Money. To be relieved in this, was the scope of the Bill, which did suggest a surprise upon the Plaintiff in getting him into that Covenant, and that it was declared by Dr. Coldcor, when he sealed, and the Defendants Cestator, That it was intended Dr. Coldcor should not undertake any further than against himself. Upon the hearing it was proved, That the matter of the Covenant upon which the Judgment was had against the Plaintiff, was controverted in the Paper-draught, and put out by the Plaintiffs Counsel, and in again by the Defendants Counsel, with the alteration only, that whereas the Covenant

Averred against a Deed.

Relief for one who had entred into a general Warranty, where he intended but against himself only, and this after Eviction.

was

298. 14. 116.

Relief against
one's own Act.

was that the Plaintiff was lawfully seized, &c. the Plaintiff's Counsel put out [lawfully] which signified nothing; for to covenant one is seized, is intended lawfully. But some proof being, that it was declared upon sealing, that the Plaintiff should undertake for his own Act only,

It was decreed, That the Defendant should acknowledge satisfaction on the Judgment, and pay Costs. And a like Case to this between Farrer and Farrer was heard, and decreed after the same manner about six months before.

The Lord Chancellor.

The Master of the Rolls.

Chief Justice Hyde.

Lee against Hale. 31 Januarij.

1. **R**uled, That a Devise of the moiety of the Personal Estate to the Wife, and then of divers Legacies, and after of the Residue to another, that the Wife shall have a full moiety, if the other moiety be sufficient to pay the Debts, and that the Debts shall go out of the other moiety. Dyer 164. Against which it was objected, That the Husband could not bequeath any part till the Debts paid, and that therefore the Debts ought to be first deducted out of the whole Goods. But that Objection was over-ruled; the other moiety left being sufficient for the Debts in his Case.

By the Devise of
the Moiety, if a
Personal Estate,
what passeth.

2. Ruled, That by the Bequest of a moiety of the Personal Estate, where the Testator had Moneys, Bonds, and a Lease for years, a moiety of the Lease passed. Against which it was objected, That that was not usually reckoned Personal Estate.

D E

Term. Sanct. Hill.

Anno Regis 14 & 15 Car. II.

I N

CANCELLARIA.

The Lord Chancellor.
Chief Justice Bridgman.
Chief Baron Hales.

*The Lord Marquess of Antrim, against the Duke of
 Buckingham. January.*

THE Lady Antrim, Mother of the Defendant, being a feme sole, and seized of a Reversion after one Life, settles the Lands to the use of her self for Life, Remainder in Tail, with Power for her, being sole, to make Leases for three Lives in Possession. The feme marries, and then she and her husband make Leases for one and twenty years (in the life of Tenant for Life) to commence from the Date, for payment of Debts, &c. as was alledged.

1. Question. If this Lease by Baron and feme was good?

D

Bridgman.

Power to a Feme,
how it is to be ex-
ecuted.

Bridgman. The Power is not pursued; for by the Marri-
age she hath put her self in the Power of her Husband; and
it is the Deed of her Husband, and not hers. And he took a
diversity between a naked Power and a Power which flows
from an Interest; for when a bare Power is given to a
Feme by Will, to sell Lands, although she marry she may
sell, and may sell the Lands to her Husband, because it was
not created by her self out of any Interest of her own.
But where a Feme upon a Settlement of her own Estate
reserves a Power which flows from an Interest, that
Power ought to be executed by the Feme sole; and if by
Baron and Feme, it is not good. And yet he said, Such
Power ought to be taken liberally, though formerly they
were taken strictly.

2 Question. If this Lease was a Lease in possession, inas-
much as it commenceth at the time of the date?

Where a Lease in
Possession out of
the Reversion as
to the Estate of
the Reversion.

For it was said, Although an Estate for Life were before
it, yet it was in Possession, in relation to the Estate of the
Reversion.

1 Roll. Abr. 381. X.
Pl. 3.
Cro. Jac. 349.
2 Bulstr. 216, 251.
Hob. 103.
2 And. 163, 164.
4 Inst. 85.
Hard. 51.

~~Bridgman~~ doubted whether the Lease was void in that
point; but was clear it was in the other point.

Hales said, Both points are worth Tryal and Argument
at Law.

The Chancellor concurred with Bridgman, and the Bill
was dismiss'd.

Fuller and others, against Lance and others.

Commission of
Bankrupt.

Fuller being a Goldsmith in London, and being disa-
bled, agreed with most of his Creditors to assign over
all his Estate upon Oath to several persons in Trust for
the payment of his Debts, as far as his Estate would pay,
he having such allowance for himself and family as was a-
greed upon; and most of the Creditors sign'd the said Agree-
ment; but some of the persons that sign'd finding that Fuller
had done some act of violation of the Agreement, took out
a Commission of Bankrupt against the said Fuller, and
seized all the Estate they could come by, and pretended
that

that some of the Creditors aforesaid that signed the Agree-
ment, and that were not to the suing out the Com-
mission, had notice in due time, though they had neglected
the same, and that it was seven months from the date of
the Commission before the Commissioners assigned. And
Fuller and other the persons concerned in the said Agree-
ment, and excluded by the Commission of Bankrupts, be-
ing not comprized, as aforesaid, preferred their Bill against
the Assignees of the Commission of Bankrupts, to have the
Agreement performed, or at least to be admitted to an equal
Dividend with them. But this Court would give no Re-
lief therein; and the rather, for that it was made appear
that Fuller had made a Sale of some of the Goods he assign-
ed to the Creditors, but dismiss the Bill.

Note, That where Committees of a Lunatick sue for any
thing in the Right of the Lunatick, in such case the Commit-
tee as well as the Lunatick are made parties.

The Lord Chancellor
William W. Justice

Edward Henry and William
May 27

The Plaintiff in this Cause is one John Smith, who was made a Bankrupt by the Commission of Bankrupts, and the Defendant is one John Doe, who is one of the Assignees of the said Commission of Bankrupts. The Plaintiff claims that he is entitled to a Dividend of the Goods of the said Bankrupt, and the Defendant claims that he is entitled to a Dividend of the same Goods. The Court has ordered that the Plaintiff and Defendant should appear before the Court on the 27th of May next, to show Cause why the Plaintiff should not be admitted to a Dividend of the Goods of the said Bankrupt, and why the Defendant should not be admitted to a Dividend of the same Goods.

By the Court
The Lord Chancellor
William W. Justice

By the Court
The Lord Chancellor
William W. Justice

DE
Termino Paschæ.
Anno Regis 1, Car. II.
CANCELLARIA.

*The Lord Chancellor.
 Windham Justice.*

*Sir Edward Heath, against Henly and Whitwick.
 May 25.*

1 Roll. Abr. 378. Pl. 4.
 March 139. Pl. 26.
 2 Chanc. Cases 217.

A Trust out of
 the Statute of Li-
 mitations.

The Plaintiff was Son and Executor of the late Chief Justice Heath (who was made Chief Justice at Oxon during the Difference between the King and Parliament, but never sat as Chief Justice in Westminster-Hall;) And the Bill was to have an Account of Moneys received by the Defendants being Prothonotaries of the King's Bench, which was alledged to belong to the said Chief Justice, and which Moneys they by their Office ought to receive for the Chief Justice by an imply'd Trust, virtute Officij. The Defendant pleaded the Statute of Limitations, 21 Jac. 16.

Upon the arguing of this Plea, it was insisted by the Plaintiff's Counsel, that this Trust was not within the said Statute. And it was answered of the other part, that a Guardian was within the said Statute, and he was trusted. Ordered that the Defendants should answer.

The

The Lord Chancellor.

The Master of the Rolls.

in the Court of Chancery.

Dorothea Dame Darcy, against Chaloner Chute,
Henry Haughton, and others.

The Plaintiff being a Widow, and seized of a Jointure worth 700 l. per annum, Mr. Chute the Father made suit to marry her, and she agreeing to it, he before the Marriage agreed with her by Deed in writing, that it should be lawful for her, or such as she should appoint, during the Coverture, to receive and dispose of the Rents of her Jointure as she pleased.

The Deed was put in Haughton's hands, he being the Plaintiff's Agent formerly.

Then the Plaintiff and Mr. Chute married, he having first agreed with Trustees of hers to settle her a Jointure; and they lived together ten years, during all which time Haughton received the Rents of the Ladies said Jointure of 700 l. per annum, and constantly with the approbation of the Plaintiff, accounted for, and paid the same to Mr. Chute, her Husband. And the Plaintiff all that time never appointed Haughton to receive the Rents for her, nor claimed any benefit by the Agreement left in Haughton's hands; but at the ten years end Mr. Chute dying, having made the Defendant his Son Executor, the Plaintiff exhibited her Bill to have an Account from Haughton, and charged 1000 l. to be resting in his hands unaccounted for, that was received in Mr. Chute her Husband's life-time, and she made Title to the same by the said Agreement made by Mr. Chute with her self before Marriage. And upon the hearing (a Case being cited and urged by the Defendants Counsel) the Court declared the aforesaid Agreement before Marriage with the Plaintiff her self, was immediately by the Marriage extinguished, the Court would not relieve the Plaintiff thereupon, but ordered the Defendant Haughton to account before a Master for what he received after Mr. Chute's death.

Page 117.
1 Vent. 343.

Marriage determines an Agreement made by Baron with Feme before Marriage.

D E
Term. Sanct. Trin.

Anno Regis 1, Car. II.

CANCELLARIA.

The Lord Chancellor.

Chief Justice Hyde.

Chief Baron Hales.

Sir Henry Bellasis and his Wife, against Sir William

Ermine, June 4.

Upon a PLEA.

THE Suit was for a Portion of 8000 l. given to the Plaintiff's Wife. The Defendant pleaded it was given her provided she did marry with the consent of A. and if not, she should have but 100 l. per annum; and that she married without the consent of A. Ordered that the Plea stand over-ruled.

Where the Condition annex'd to the Gift of a Portion shall defeat the Portion, and where not.

2 Modern 308.
2 Pw. 352.
Rep. 140.

And the Court all declared this Proviso was but in terrorem, to make the person careful, and that it would not defeat the Portion.

But it was said in the Case of her Marriage without the consent of A. if the party that gave the Portion had limited it to another, there it had been otherwise. And in this case the Wife was not unequally married; for the Plaintiff is the heir-apparent at Law of the Lord Bellasis.

The

The Lord Chancellor.

Pawcy against Bowen. June 26.

Resolved, That where a person hath power to lease for ten years, and he leaseeth for twenty years, that the Lease for twenty years shall be good for ten years of the twenty in Equity. And it was said to have been so settled several times in this Court.

A Lease for more years than the Lessor had power for, shall be good for so many years as he had power for.

Crispe and others, Executors of Sir Nicholas Crispe,
against Blake. June 26.

In 1642. Sir Nicholas Crispe and four others became bound to the Defendants Testator in 1600 l. for the payment of 1000 l. and Interest at six months end. Interest was paid till 1644. In Michaelmas 1662. the Defendant got Judgment against Sir Nicholas Crispe, and one other of the Obligors for 1600 l. (being the Penalty.) Afterwards there was paid by them, against whom the Judgment was, and the other Obligors, at several times to above 1600 l. And so the Bill was to have the Judgment vacated, and the Bond delivered up, paying so much as would make up the Penalty of the Judgment, and Interest for the same since the Judgment.

It was insisted on by the Plaintiffs Counsel, That when Judgment was had on the Bond, it remained no longer a Debt on the Bond, nor was Interest due on the Judgment; so what was paid after must be taken as paid on the Judgment; and if they had brought that 1600 l. into Court at Law, (and offered to pay it before Execution) the Court at Law would have accepted it. And therefore, being willing to make up what was paid already the full of the Judgment and Damages since the Judgment, ought to be relieved against the Judgment.

On the Defendants part it was insisted, That there was more Money due for Interest on the Bond, and that that was paid as well by those Obligors against whom there was no Judgment, as by those against whom the Judgment was;

was; and what was paid by those against whom there was no Judgment, their part of what was paid in by the course of the Court was to be taken as Interest, there being more Interest due on the Bond than the Money paid; and there is no Equity in this Case to hinder the Defendant from recovering of what he can at Law, there being much more in Conscience due; and if what is justly due be to be received by any course of Law, no Equity ought to hinder it, so as he do not receive more than Principal, Interest and Costs, which the Defendant offers to take on Account.

An. 14. Post. 326.

He that takes a Security by a Penalty, ought not to have more.

Moneys paid before actual entering of the Judgment, is to be taken as paid on the Bond, though the Judgment be of a Term before the payment.

So Judgment on a Bond worse Security than the Bond only.

It was replied by the Plaintiffs Counsel, That one Satisfaction by any of the Obligors, shall be a Discharge at Law for the rest; and a Release to one Obligor is a Discharge to all the rest. And when a man takes a Security by a Penalty, he sets up his Rest there, and makes himself Judge of what he would have, and ought not to have more. And after a long Debate, where the Case of Whitchcor and Underhil was cited, it was ordered, That the Plaintiffs do pay so much, with what was paid, as will make up the Penalty of the Judgment and Damages at 6l. per Cent. for the Penalty and Costs here and at Law, and thereupon the Bond to be delivered up, and the Judgment vacated: But with this Proviso, That if 250l. paid in November 1662. were paid before the Judgment entered into, and the Judgment entered after of that Term, that that must be taken as paid as Interest, because the Defendant received it on the Bond, the Judgment then not being entered, which a Master is to examine; and if he find it, to allow the same as paid on the Bond for Interest, and the Master to take the Account.

So note, That a Judgment on a Bond, on which there is more due than the Penalty for Principal and Interest, is worse Security than the Bond only.

The

The Lord Chancellor.

Smith against Oxenden.

The Case was, The East-India Company sued their Factor for an Account of 12000*l.* in Gold he carried hence into the East-India. He upon his Account demanded (according to the usual Custom) Allowance for so much paid for Customs to the King in India. It was insisted, That he never paid the Customs there for the Gold: So whether the Factor or the principal Merchant should have the benefit of the Customs, was the Question. Post. 10, 76.

And this was referred to Merchants. And two Merchants certified, That by the course of Merchants the Factor should retain the benefit of the nonpayment of the Customs, for that if the principal Freight by his nonpayment of the Customs had been lost, he must have answered for it to the Employer, and so run the hazard wholly. And in this Case the Factor, by the Law in East-India, had it been discovered that he had concealed the Gold, and not entered it into the Custom-Books, was to have lost his Life as a felon.

Two other Merchants certified, That the Employer was to have the benefit of the nonpayment of the Customs. And upon these Certificates, it was decreed, That the Factor should have the benefit of the Customs, for it was a Duty to be paid, and the Employer could make no Title to it against him that was in possession; and he that hath Possession hath Right against all but him that hath the very Right. The Factor shall have the benefit of Customs saved, and not the Employer.
Vide Borr against Vandale.

Randal against Richford. June 2.

A Witness alledged he had mistaken himself at a Commission. The Commission being returned, he came to London, and made Oath that he was surprised. A special Commission issued to re-examine the Witness, which was done accordingly; but this special Commission was superseded by Motion, by Advice of the Master of the Rolls with the six Clerks, as contrary to the course of the Court.

D E

Term. Sanct. Mich.

Anno Regis 15 Car. II.

I N

CANCELLARIA.

Chief Justice Hide.

Sheldon against Weldman. October 11.

Upon a P L E A.

The Bill was to have an Account of Money delivered by the Plaintiff's Father (whose Executor the Plaintiff was) to the Defendant to compound for the Plaintiff's Father's Estate (sequestered for Delinquency) at Goldsmiths Hall.

Money upon a Trust, out of the Statute of Limitations.

1 Roll. Abr. 387.

Pl. 4.

March 139. Ant. 20.

3 Chanc. Cases 217.

The Defendant pleaded the Statute of Limitation of Accounts, 21 Jac. 16. Upon arguing his Plea, it was insisted by the Plaintiff's Counsel, That an Account for Moneys delivered upon a Trust was not within this Statute, and that it had been so ruled; and thereupon the Plea was overruled, and the Defendant ordered to answer.

Lord Chancellor.
Justice Windham,
Justice Twisden.

And in Trinity Vacation, 16 Car. 2. the Case being heard by the Lord Chancellor, Justice Twisden, and Windham, the two Judges and the Lord Chancellor declared and were of Opinion, That the Statute of Limitations did not bar this Suit, because it was on a Trust that the Defendant had the Money for which the Account was sought. But for another Reason the Bill was dismiss'd.

The

*The Lord Chancellor.
Chief Justice Hide.*

Nanney against Martin. October 15.

Baron and Feme have a Decree for Money in the Right of the Wife, and then the Baron dies. A Question is moved, Who shall have the benefit of the Decree, whether the Wife, or the Executor of the Husband? *Rep. Chanc. 233.*

And this Case being referred to Chief Justice Hide, he had given his Opinion, That the benefit of the Decree belongs to the Wife, and that it was so in a Judgment at Law. And Exception being taken to that Certificate of the Judge, he refused to hear the matter of the Exception, but left it to the Chancellor; but declared his Opinion was still the same. And 18 Jan. 1663. at the Seal, the Lord Chancellor would not refer it back, but confirmed the Judge's Certificate. *The benefit of a Decree by Baron and Feme belongs to a Feme, and not to the Executor of the Husband.*

Chief Justice Hide.

Gervas Scroope, an Infant, against Sir Adrean Scroope.
October 15.

A Bill was to be relieved touching the Manor of Gidley in Lincolnshire, and sets forth, That Gervas Scroope deceased, Father of the Defendant, and Grandfather of the Plaintiff, was seized in Fee thereof, and devised the same to the Plaintiff and his Heirs; and that the Defendant having gotten all the Writings, laid Claim to the same, and got into possession thereof, and did pretend that the said Manor was purchased heretofore in the Name of the said Sir Gervas and him, and to their Heirs, and that so Sir Gervas had no power, being Jointenant, to devise the same, whereas his, the said Defendant's Name was used in the said Conveyance in Trust for the said Sir Gervas, and the Purchase was made, and the Money paid by Sir Gervas; and that so the

Defendant's Title was but as a Trustee for Sir Gervas, and consequently for the Plaintiff, to whom Sir Gervas had devised the same.

The Defendant pleaded, That the premises were the 19th of June, 13 Car. 1. by good Conveyance in Law well executed for 4600 l. really and bona fide paid, conveyed by J. S. to Sir Gervas Scroope, and the Defendant, and their Heirs, the Defendant being the Son and Heir-apparent of Sir Gervas; and that the said 4600 l. was raised by Sir Gervas by sale of the Lands, which were the ancient Inheritance of the Family, and which, if they had not been sold, had descended on the Defendant; and averred, That all the Courts of the said Manor that were kept in Sir Gervas's life were kept in as well the Defendant's Name as in Sir Gervas's Name; and that the said Conveyance to Sir Gervas and him, was really and bona fide, without any Trust for Sir Gervas or any other; and that Sir Gervas being dead, the Defendant claimed the premises by Survivorship, and demanded Judgment.

The Father joins the Son with him in the Purchase, it shall not be presumed a Trust in the Son, unless it be expressly declared.

The Plaintiff did not attend, but was alledged to be out of Town, and pray'd it might stand for another day. But the Court directing the Plea to be opened, which was done, and afterwards read, declar'd it clearly to be a good Plea, unless the Plaintiff could prove an express Trust; and if he could have done that, he ought to have reply'd; but not having reply'd, the Plea must be taken to be true; and that albest the Purchase was made by the Father in his own and his Son's Name, it should prima facie be intended an advancement for the Son, and not presumed a Trust, unless declared so; and that it was anciently the way to join the Son in a Purchase, to avoid Wardship. And the Case of Crisp against Prat, 1 Cro. 550. and Sir Sidney Mountague's Case there, were in the Debate of this Case urged; and the Court declared to the Defendant's Counsel, this being the Case, that nothing could be said against the Plea, and so allowed it. 17 November, 1663. the Plea was re-heard, and upon Argument on both sides was allowed, with double Costs.

*The Lord Chancellor:
The Master of the Rolls.*

Chute against the Lady Dacre. October 23.

The Defendant having mistaken her self in her Answer, as was alledged, having therein sworn something which was found by her afterwards to be otherwise: it was alledged by her Counsel, and Affidavit made by her self too for that purpose, That those matters untruly set forth were added in the Margin of the Draught after she had perused it, and so she was thereby surprized. And it was alledged, That no Replication was filed prout Certificate, and Affidavit of Notice of this Motion to the other side was read. But the Plaintiff making no Defence, it was ex parte, on the Defendant's Motion, ordered, That she be at liberty to amend her Answer in the said matters mistaken. And it was said, That like liberty had been given to a Defendant to amend his Answer before Replication in a Case between Chettle and Chettle in the Lord Coventry's time.

Liberty given the Defendant to amend her Answer, she being surprized therein.

At the Rolls, the Master of the Rolls.

Manning against Burges. October 26.

A Mortgage was forfeited, the Mortgagor afterwards meeting the Mortgagee, said, I have Moneys, now I will come and redeem the Mortgage. The Mortgagee said to him, He would hold the Mortgaged Premises as long as he could; and then when he could hold them no longer, let the Devil take them if he would. And afterwards the Mortgagor went to the Mortgagees house with Money more than sufficient to redeem the Mortgage, and tender'd it there; but it did not appear that the Mortgagee was within; or that the Tender was made to him; And it was decreed a Redemption, and the Defendant to have no Interest from the time of the Tender, because of his wilfulness.

A Mortgagor refusing to receive his Money on Tender after Forfeiture, shall lose his Interest from the Tender,

A like Case between Peckham and Legay about a year since.

The

*The Lord Chancellor.
The Master of the Rolls.*

Borr against Vandall. October 27.

Ant. 25. Post. 76.

Whether Factor
or Employer shall
have the benefit
of Customs stolen
by the Factor.

The Factor had stolen the Custom of divers Goods, of which the Bill was to have an Account, and to discover whether he paid those Customs or no. The Defendant by Answer insisted, That he was not bound to answer that part of the Bill, for that the Plaintiff, who was the Employer, was not entitled to those Customs, nor any Advantage whether they were paid or not. Exception being taken to this Answer, the Master certified the Answer sufficient. Exceptions being taken to the Report, the Cause came now to be heard upon that; and the Cause of Smith and Oxenden, fol. 25. was cited. But on the Plaintiff's side it was insisted, That this Case was not like that; for that was of Customs stolen from a Foreign King, and this was of Customs stolen from our own King; and that it would be of evil consequence, and an Encouragement to evil Factors, if the Court should give an Opinion for them in a matter of Fraud, as this was. And whereas it was insisted by the Defendant's Counsel, That it was the Course of Merchants that Factors should have the benefit of Customs themselves, and not the Principals, because the Penalty would fall on the Factor if discovered: it was declared, that could not be called a Custom, being grounded upon Fraud; and therefore the Court ordered, That the Defendant should answer whether he paid the Customs or not. Vide Smith against Oxenden, fol. 25.

The

The Lord Chancellor.

Rich against Jaquis. October 29.

Rich was Plaintiff upon a Certiorari Bill to remove a Cause out of the Mayor's Court, his Witnesses being out of that Jurisdiction, and the Bill here was for an Account touching other matters. Witnesses being examined, the Defendant moved for a Procedendo, and insisted upon it, for that if the Cause should be heard here, he could not be relieved, not having any Bill here, being here but Defendant, though Plaintiff in the Mayor's Court.

Whereunto the Plaintiff's Counsel insisted, That no Procedendo ought to be; for that this Bill containing other matters, could not be determined upon the Bill in the Mayor's Court, and that the Bill could not be divided; and that the Plaintiff in the Mayor's Court might file his Bill in the Mayor's Court in this Court, and direct it to the Chancellor, and have the same Remedy here as he could there.

Ordered, That the Cause stand to be heard on the Bill in this Court. And after hearing, the Cause was dismissed out of this Court.

Certiorari Bill brought to hearing.

The Lord Chancellor.

Jew against Thirkwell. October 30.

The Plaintiff was Lessee of divers Lands, whereupon an Inlie Rent was reserved. Afterwards the Inhabitants of the Town where part of the Lands lay claimed Right of Common in part of the Lands so let; and upon a Tryal of their Right, are found to have Right of Common there. Now this being but a Right of Common recovered, is no Eviction of the Land in Law, because the Soil was not recovered, and so no Apportionment could be at Law; and therefore the Bill was to have the Rent apportioned in Equity.

And

Apportionment of
Rent in Equity,
where it cannot be
in Law.

And Serjeant Maynard insisted, That such apportionment had frequently been decreed here. But in this Case it appearing, that notwithstanding the Right of Common, the Lands were worth the Rent reserved, and better, the Court would not decree it, but the Bill was dismissed.

Wolestoncroft against Long. November 6.

Debts on Bond &
simple Contract to
be paid in equal
proportion where
Lands are to be
sold for payment
of Debts. So of
Debts and Lega-
cies.

A Debtor upon Bonds and simple Contract makes a Conveyance of Lands upon Trust to sell for payment of his Debts. It was declared to be the constant Practice, and so ruled and decreed here, That all the Debts should be paid in proportion; and that if the Lands were not sufficient to pay all, all should lose in proportion. And so it is where Lands are given to pay Debts and Legacies, they shall be paid in equal proportion, because the Land is made liable to the one as well as the other by the Debtor himself. But otherwise it is in case of Debts on Judgments, that in their own nature charge the Lands.

The Lord Chancellor.

Baker against Beaumont. November 6.

One in the Fleet for breach of a Decree, for not vacating of a Judgment, by Judgment in a feigned Action in the King's Bench gets himself turned over thither, and so had Liberty to go abroad, and got the Defendant in the Judgment taken in Execution in Exon, and on a Habeas Corpus he was brought hither, and re-committed to the Fleet, and confined to his Chamber, and a Habeas Corpus with a long Return for the Defendant in the Judgment, granted.

The

*The Lord Chancellor.
Master of the Rolls.*

Ayre against Ayre. November 10.

The Plaintiff being the Widow of her husband, sued the Defendant, who was his Executor, to have allowance of a satisfaction for several Debts of the Testator's (which she, having possessed her self of his Estate, had paid) the Executor having gotten all the Estate out of her hands. It was much controverted, whether she could be helped herein? for tho' Executor of his own Wrong shall be allowed all payments made to any but himself, yet she was not Executrix of her own Wrong; for where there is a rightful Executor, as here, there can be no Executor de son tort. Yet it resembled that Case; and the Court doubting much what to do in this Case, decreed by consent of Counsel, that she should be allowed for all payments that she had made which were incumbent on the Executor to pay, according to the course of Law; but that if she had made any payments out of Order and Rule that the Law left the Executor liable to, that such payments she should not be allowed for, if they were to the prejudice of the Executors.

A Widow paying just Debts of her Husband out of his Estate in her hands, shall have allowance for the same from the Executor.

In Court.

Sackville against Dobson. November 10.

Limitation of the Trust of a Term to Husband and Wife, and the longest Liver of them, for life, and after to the eldest Issue of them, none being then born; a good Limitation. So the Limitation to Husband and Wife is but one Limitation; and so it was admitted by Counsel, it being not controverted; for tho' the Trust of a Term, according to the Rule in Goring and Bickerstaff's Case, fol. 4. may be limited to divers persons that are in being one after another, because the same is transferrable, yet it cannot be good beyond two Limitations to a third person not in

Limitation to Husband and Wife is to be accounted as one Limitation in the Trust of a Term.

Perpetuity.

f

being:

being : Ergo, The Limitation to Husband and Wife, and longest Liver of them, was admitted to be but one Limitation in this Case.

*The Lord Chancellor.
Justice Tirrel.*

More against Mayhow. November 10.

The Plaintiffs Bill was to be relieved upon a Trust, and charged the Defendant with notice of that Trust, and that he had gotten a Conveyance of the Lands upon which the Trust was had; and that at or before his taking the said Conveyance, he had notice of the said Trust for the Plaintiff.

Purchaser without Notice.

The Defendant by way of Answer denied that he had any notice of the Trust at the time of his Purchase or Contract, and pleaded that he was a Purchaser for a valuable consideration. It was insisted the Plea was not good, because he did not say what the valuable consideration was; for 5 s. was a Valuable Consideration, but yet no Equitable Consideration.

The Court declared that the Plea in this Case was well enough.

*Hardres 160, 316.
2 Vent. 361.
2 Chan. Cases 161.
1 Chan. Cases 39.*

Notice of an Incumbrance any time before the Conveyance executed, shall bind him.

It was farther insisted, That the Plea was founded upon the Answer, viz. That the Defendant had no notice, &c. And that the point of Notice was not well answered, in that the Defendant denied Notice at the time of the Purchase only, and the word Purchase might be understood when the Contract for the Purchase was made; and it might be he had no notice then, and might have notice after, before or at sealing of the Conveyance; And if there was any notice before the Conveyance to him executed, that should charge the Defendant: And that it was so lately decreed in a Cause between Sir William Wheeler and and Yarroway and Nicholas, by the Lord Chancellor. And so the Plea was overruled,

Garfoot

Garfoot against Garfoot. November 10.

On a Demurrer.

Lands were devised to the Feme for Life afterwards to be sold by the Executor for younger Childrens Portions; the Executor dies, the Feme dies; the younger Children prefer their Bill against the Heir; he demurs, because but an Authority in the Executor, which is dead with them: but the Demurrer was over-ruled.

Lands devised to be sold by Executor who dies; the Bill brought against the Heir, who demurs, and over-ruled.

4 Leon. 8.

2 Vent. 350.

1 Levinz 238.

Post 104, 159.

2 Chan. Cases, 30,

68, 69.

Regnes against Lewis. November 17.

On a Demurrer.

The Demurrer was, for that a Feme Covert sued without her Husband. But she being to be relieved touching a separate Maintenance agreed to by her Husband, the Court over-ruled the Demurrer, declaring the Feme might sue without her Husband.

Wife sues for separate Maintenance without the Husband.

The Lord Chancellor.

Baron Turner.

Churchil against Grove and others. November 24.

On a P L E A.

The Plaintiff having a Judgment and a Mortgage, exhibited his Bill against the Mortgagee and Conusee of a Statute by the Mortgagee, to have a discovery what is due on the Statute, that being precedent to the Plaintiff's Securities, and upon payment to have the same set aside.

Purchaser without notice.

The Cognizee pleaded, That he having extended his Statute, and the Cognizor and he stated Accounts, and the Sum of 3000 l. being due to him, he in consideration thereof had an absolute Conveyance of part of the extended Lands, and shewed what Lands were conveyed to him by the Cognizor, and that thereupon he assigned the residue of the extended Lands to the Cognizor; and that so he was a Purchaser without notice of the Plaintiff's Title, for a valuable consideration.

It was also pleaded, That the Cognizor was in Execution on the Plaintiff's Judgment, and so the Plaintiff could not extend the Lands, nor the Lands be liable during the life of the Cognizor.

On the Plaintiff's part, it was to the first Point insisted, That it did not appear that the Defendant was a Purchaser, there being no new Money paid upon the executing the Conveyance; but coming in for the consideration of Money due on the Statute, was no Purchase. And that it was common Equity for him that had the subsequent Judgment to be relieved against the precedent Statute on payment of what was due; and that there was, for ought appeared, no more there; and that the Account made up between the Cognizor and Cognizee on the pretended Purchase ought not to affect the Plaintiff; and that therefore the Defendant's Purchase being subsequent to the Plaintiff's Security, ought not to be aided by the Statute; and that the Plaintiff's Judgment being of Record, the Defendant was bound to take notice thereof at his peril; and that in this Case the Defendant ought not to protect his pretended subsequent Purchase by his precedent Statute, but that he ought, upon payment of the Statute, to yield Possession to the Plaintiff.

But this was strongly opposed by the Defendant's Counsel, who insisted that the Defendant was a Purchaser; and that though no new Money was advanced on the Purchase, yet he assigned over and parted with part of the extended Lands in consideration thereof, which was as valuable as Money. And that it was the constant Justice of this Court, that if a Purchaser bona fide did buy in an eigne Incumbrance, Statute or Judgment, and there were a Judgment or Statute mesne between that and his Purchase, of which he had no notice at his Purchase, that he should protect his Purchase with the eigne Incumbrance so bought in. And it was insisted, That though Judgments were on Re-

cord,

2 Vent. 137, 338.
Hard. 173.

1 Chanc. Cases 208,
20, 35, 223.

1 Chanc. Cases 163,
163, 201.

Purchaser shall
protect his Pur-
chase by buying
in an eigne In-
cumbrance.

cord, and a Purchaser is bound to take notice thereof at Law, yet in Equity, where the Cognizee of a Judgment comes to be helpt to extend his Judgment against a Purchaser, he must prove exprefs notice of the Judgment in the Purchaser, or else shall never be relieved against the Purchaser. And upon this Point the Plea was allowed; And as to the other Point, That the Cognizor being in Execution upon the Judgment, and so the Land not to be charged during his life: it was strongly insisted, That was no good Exception in Equity, for that the Bill was to discover Incumbrances, which the Plaintiff could not have after the Cognizor's death. And it was positively affirm'd, that it had been ruled here, That a Bill will lie, notwithstanding the Debtor was in Execution upon the Judgment. But this Point was not much debated; howbeit the Court inclin'd in Opinion, That this part of the Plea was not good.

Purchaser shall not be affected by a Judgment in Equity, without exprefs notice of it before the Purchase.

Whether the Cognizee of a Judgment having the Cognizor in Execution, can bring a Bill whilst he lives to charge the Lands.

Williams against Arthur, November 24.

On a Plea and Demurrer.

A Decretal Order was produced in 1657. for several matters; and then after the Cause had depended on Account three years, a Decree was drawn, wherein the said Decretal Order was recited, but part of the matter thereby decreed was omitted in the decretal part of the Decree it self; and soon after the Decree signed and inrolled, the Defendant died. A Scire Facias was sued to revive, and in the prosecution thereupon the Plaintiff discovered the omission, and so could not have the benefit of that part which was omitted in the Decree that way, and the Defendant being dead, could not help that omission by a Motion upon the surprise. The Bill now was a Bill of Reviver to revive so much of the Decree as was omitted, as was alledged; howbeit in truth the Bill was to the whole Decree.

Part of the matters being omitted in drawing up the Decree, a Bill of Reviver lieth to revive those matters.

It was pleaded, That the Decree being inrolled, a Bill of Reviver did not lie, but a Scire Facias. Ordered, That the Plea and Demurrer be over-ruled.

Chief

*Chief Justice Foster.
The Master of the Rolls.*

Merry against Abney the Father, and Abney the Son, and Kendal. November 26.

All which were heard on Abney the Son's Plea, about Trin. 12 Car. 2. and the same Cause heard this day.

Kendal contracted with the Plaintiff to sell him certain Lands in Leicestershire. Afterward Abney the Father, who lived near the Lands, in behalf of Abney the Son (a Merchant in London) purchaseth those Lands of Kendal, and had a Conveyance from Kendal to Abney the Son, and his Heirs. The Plaintiff's Bill was to be relieved upon his Contract with Kendal, and against the Conveyance to Abney, and charged notice of his Contract to both the Abneys. Abney the Son pleads himself to be a Purchaser bona fide, without any notice of Kendal's Contract with the Plaintiff, and without any Trust for his Father.

Notice to him that purchaseth for another, shall affect the Purchaser himself.

The Court declared, That notice to the Father in this Case was notice to the Son, and should affect the Son, who was the Purchaser. So that notice of a dormant Incumbrance to a party that purchaseth for another, shall affect the very Purchaser. And accordingly was this Cause decreed, it appearing at the hearing that Abney the Father had notice of Merry's Contract before he purchased for his Son.

The Master of the Rolls.

Seabourne against Blackstone. November 26.

The Wife received Money due on a Bond entered into by one to her Husband. She usually received and paid Money: He got Judgment on the Bond. Ordered that he acknowledge Satisfaction thereupon.

The

*The Lord Chancellor.**Master of the Rolls.**Davie against Beardsham and his Wife.*

DAVIE agrees for the Purchase of certain Copyhold Lands, which were surrendered out of Court to his use; but before Admittance he dies, having other Copyholds, and having made his Will after the said Contract, and thereby devised to the Plaintiff (who was then and at his death his visible Heir) all his Copyholds after his death; his Wife being priviment enseint at his death, is delivered of the Defendant's Wife, who then becomes the Heir of the Devisor. The Plaintiff taking it for granted that the Copyholds so contracted for, did not pass by the Will, suffered the Heir to be admitted thereunto, and held the same of the Heir for twenty years, and paid her Rent for that time, and had agreed so to do as long as he should hold them. Afterwards differences arising between the Heir and him about other matters, the Plaintiff exhibited his Bill (inter alia) to have those Copyhold Lands decreed him. And it was declared upon the hearing by the Court, That it was clear the said Copyholds so agreed for did pass by the Will to the Plaintiff, for that the Purchaser had an Equity to recover the Land, and the Vendor stood trusted for the Purchaser, and as he should appoint, till a Conveyance executed. And the Case of the Lady Fohaine, about 1657. was cited, where it was ruled, That if upon Articles for a Purchase, the Purchaser dieth, and deviseth the Land before the Conveyance executed, the Land passeth in Equity. But in the principal Case, inasmuch as the Plaintiff had admitted the Title to be in the Heir, and paid her Rent, and agreed so to do, the Court would not decree it; but declared, if the Plaintiff had come in time, it was proper to be decreed.

*Hard. 160, 216.**2 Vent. 361.**2 Chan. Cases 161.**Ant. 34.*

Lands contracted for, pass by Devise of the Purchaser.

Vendor after contract to purchase, stands trusted for Vendee.

Jones against Done.

IN which Case a Decree was made, whereby it was decreed, That an Office was extendible in Law or Equity.

An Office extendible.

Bishop

Bishop against Bishop.

Rep. Chanc. Part 1.
143.
Award.

An Award confirmed in part, and made void in part.

*The Lord Chancellor.
Master of the Rolls.*

Guilbert against Hawles. 12 & 17 Feb. 14 Car. 2.

After a Decree
the Plaintiff may
not dismiss his
Bill.

The Bill was to be relieved against an Action for Rent, and at the hearing of the Cause it was decreed to account, and that the Plaintiff should pay what was due to the Defendant on Account. The Account was stated by a Master; then the Plaintiff moved to dismiss his Bill, paying what Costs the Court would assess; which was opposed, for that the Judgment of the Court being given, the Plaintiff ought not to abuse the Court and depart from it; and the Case of Wingfield and Thomas was cited, whereby upon an Obligation the Plaintiff here was decreed to pay Principal, Damages, and Ale; and afterwards the Plaintiff there would have dismissed his Bill, but it was deny'd.

Churchil insisted, That Quilibet potest renunciare juri pro se introducto.

The Master of the Rolls directed it to be moved before the Chancellor, and 17 Feb. it being moved before him, it was deny'd. And the said Chancellor and Judge Brown in 17 Car. 2. between Chearly and Packington, gave the like Rule in the same Case.

Edgworth against Davies. 1 July, 14 Car. 2.

Upon a P L E A.

The Bill was to have an Account of the Profits of Land which the Defendant had received on Trust for the Plaintiff during his Minority, and for Moneys receiv'd upon Bonds belonging to the Plaintiff, and for Writings, &c. The Defendant pleaded, That the Lands lay in Cheshire, and that the Defendant lived in Cheshire in the County.

County Palatine of Cheshire and Lancashire, and therefore not within the Jurisdiction of this Court. This Plea having been formerly argued before Judges in absence of the Chancellor, they ordered Presidents to be produced, which were as follows: *Hern against Smith*, 12 Eliz. for that the Lands lay within the Dutchy, was over-ruled. *Sherborn against Vaughan*, 13 May, 14 Car. The Bill was, to be relieved on Trust; the Defendant pleaded the Jurisdiction of the Dutchy; this was *ex parte*. But in my Lord Coventry's time, *Hales against Daniel*, 24 Octob. Car. 1. *ad idem*; in which Case, the thing being for a Personal Estate, the Court over-ruled the Plea of the County-Palatine; and in the same Cause, Mr. Page, to whom it was referred to certify, reported upon the view of Presidents, That the Jurisdiction of the Counties Palatine was allowable between parties dwelling in the same County, and for Lands there, and for matters local. And in the Argument of the principal Case was cited the Case of Sir John Egerton and the Earl of Derby; and upon long Debate in the principal Case, the Plea was over-ruled, but without Costs.

The Lord Chancellor.
Baron Turner.

Clark against the Lord Angier. 3 July, 14 Car. 2.

Upon a Demurrer.

A Legacy being given to a Feme Covert, who was Covert when the Legacy was given; the Husband of the Wife, without her, exhibits a Bill for it, because the Wife was no Party. The Defendant demurred, for of things meerly in Action belonging to the Wife, as a Bond, &c. he ought to join in Suit; but otherwise it is of a Rent running in the Wifes Right after Marriage. If the Husband alone should sue the Bond, and be nonsuited or dismissed, that will not conclude the Case; but if he die before Judgment or Decree, the Wife cannot revive the Suit.

Where a Feme Covert ought to join in a Title, Suit, &c. and where not.

Parker *against* Palmer.

Upon an Appeal from a Decree at the *Rolls*.
27 Januar. 14 Car. 2.

Parker sold a Lease which he had from the Dean and Chapter for three Lives, to Palmer, &c. And it was agreed Palmer should pay 4320 l. for it. After the Defendant agreed with the Plaintiff, that if he would abate him 420 l. he would re-convey the Lease whenever the King and Dean and Chapter were restored. The Plaintiff thereupon abated the 420 l. and the King and Church being now restored, the Plaintiff exhibited his Bill for the Lease, which the Master of the *Rolls* decreed to him.

Agreement, tho' the Considerations be unequal, decreed.

Note, That this was decreed against the Son of the Purchaser, the Father being dead.

The Question was, Whether he came in by Settlement, or as an Occupant?

Upon Appeal to this Decree, it was affirmed by the Lord Chancellor and Bridgman. And in this Case it was objected, That this Court ought not to decree that, for 'twas but in the nature of a *Wager*, and the consideration unequal and penal; and that an *Action* more properly lay; and that it was at the discretion of the Court to decree an Agreement, or not, when it ought to be performed *ex debito Justitiæ*. Yet it was decreed *ut supra*.

The Lord Chancellor.

Savil *against* Darrey.

1 *Rolls Abr.* 382. 2.
Pl. 1. *Aut.* 3.

Money decreed by Rule of Court to be paid before a Bill of Review: but upon giving Security to pay it, the Rule dispens'd with.

A Decree was obtained for a great Sum of Money: A Bill of Review was brought, and new matter assigned. The Rule of Court was pleaded, That the Defendant ought first to pay the Money before the Bill should be brought into Court. Let him give good Security for the Money, and we will dispense with the Rule. The like Case between Baston and Biron, by Order of the House of Peers, about 1662.

D E

DE
Term. Sanct. Hill.

Anno Regis 15 & 16 Car. II.

IN

CANCELLARIA.

The Master of the Rolls.

Curtels against Smalridge. January 26.

The Defendant's Wife had pawn'd her husband's Plate to the Plaintiff for 110l. The Defendant in Trover for this recovered 115l. Damages against the Plaintiff, and Judgment for it. A Bill was to be relieved against this Judgment, for that the Defendant was privy to the pawning, and had the 110l. And the Plea being read, it appeared that the Defendant had confessed so much; which if it had been proved at the Tryal, it was agreed the Defendant could not have recovered in the Trover; and there being no proof now, that the Defendant at Law could not by reason of any accident have his Witnesses at the Trial, the Court would not on any neglect of his grant a new Trial.

And it was insisted upon as a Rule, That nothing shall be a ground to direct a new Trial to avoid a Judgment at Law, that would not be ground for a Bill of Review to reverse a Decree; and a Confession subsequent to a Decree, no ground for a Bill of Review. For is the want of any Evidence or Matter which might have been used in the first Cause,

Rule or Maxim:
Nothing a ground
for a new Trial
after Judgment,
that is not ground
for a Bill of Re-
view.

Post. 45. with the
Notes thereupon.

and of which the party had then knowledge, any ground for a Bill of Review: And here is no proof but that the Plaintiff might have had the Witnesses that were examined here at the Tryal; and so this Cause was dismiss'd.

The Lord Chancellor.

Baron Turner.

Read against Hambey. Febr. 18.

On a Demurrer.

The Bill was to explain a Decree, wherein the Case was, One seized of the Manor of Wrangle, worth near about 110 l. per annum, and another of a Farm in Wrangle held of the same Manor, worth 250 l. per annum, and the Fee of both came after into one person's hands, he having articulated to settle the Manor of Wrangle, worth 110 l. per ann', with the Improvements. It was on the Articles decreed, his Heir should convey the Manor of Wrangle, with all the Improvements, to the Plaintiff in the first Suit; And if the Manor was not worth 110 l. per annum, it should be made up out of the other Lands. By this Decree and Unity of Possession of the Manor and Farm, the Plaintiff claimed all the Manor and Farm; and the Bill being to explain the Decree, charged the Farm to be worth 250 l. per annum, and the Manor 110 l. per annum, and therefore desired to have the Decree explained, Whether the Decree intended All, or only the Manor according to the Articles? The Demurrer was, For that it was an Original Bill, and sought to alter or change the Decree.

For the Plaintiff it was insisted, That the Plaintiff was without any possibility of help but by this Bill; for that it being to be relieved upon a Fact not in Issue, nor appearing in the former Cause, a Bill of Review would not lie for it; and that the Defendant by having demurred, had admitted the Bill to be true; and then the Case was, That the Lands claimed without the Decree, were worth 400 l. per annum, whereas the Articles on which the Decree was founded, were but for 110 l. per annum; and therefore it was strongly urged that they ought to answer.

For

For the Defendant it was replied, That no Original Bill ought to explain a Decree upon any matter precedent to the Decree; and the consequence of that was alledged to be dangerous, for it would be introductive of a means to blemish and hinder the execution of a Decree. And as to the hardship of the Decree, or the intent of it, it was insisted, That that would be fit for Determination upon an Execution for Nonperformance, where the Defendant might set out what he had to say for his excuse, and then it would be proper for the Court to declare what was the intent of the Decree, and that the Justice or Injustice of the Decree might then be determined. And of this opinion the Court seemed to be. But the Plaintiff's Counsel insisting, That the Defendant would be bound in a Prosecution on the Decree by the Letter of it, and could not then put any Interpretation on it against the Letter of it, they therefore pray'd leave of the Court to set forth the Special Matter on Examination: which the Court would not give an Order for. And as to the Plaintiff's Objection, That the Demurrer admitted the Bill, and so ought to have an Answer, because the Manor and Lands were of the value ut supra, it was answered by the Defendant's Counsel, *Alligari non debuit, quod probatum non relevat*; and the Demurrer was allowed. Then the Plaintiff's Counsel pray'd the signing and inrolling of the Dismission of the Demurrer might be stay'd till the Plaintiff was examined on Interrogatories for breach of the Decree, &c. But the Court deny'd it.

Original Bill not to be admitted to explain a Decree upon a Fact precedent.

2 Bulstr. 197, 215.

3 Bulstr. 118.

Cre. Jac. 336.

1 Roll. Rep. 311.

4 Inst. 85.

1 Roll. Abr. 382. 2.

Pl. 3, 4.

Lane 68, 69.

Ant. 43, 44. Post. 54.

Non debet alligari quod probatum non relevat.

DE
Termino Paschæ.

Anno Regis 16 Car. II.

IN
CANCELLARIA.

Bawtrej and his Wife, against Ibson. May 4.

William Ibson being possessed of a term for years from the Vicars Choral of York, assigned the same to Trustees, and then buys the Inheritance from the Trustees for sale of Church Land: And before Marriage, covenants to stand seized to the use of himself, and Wife, for life, for a Joynture.

In 1659. William Ibson dy'd, having made his Will. After his death, his Reli'd entred and held the Lands; and then, upon agreement with his Executors for Money paid, released to them the Personal Estate of the Testator, and all demands for the same. Soon after, the King being restored, the Title of the Inheritance under the said Purchase became void. The Widow married the Plaintiff, and they two brought their Bill against the Executors of William Ibson, and the Assignees and Trustees of the Lease; and it was to the end, that though the Inheritance was evicted, they might hold for so long of the Term as the Joynturels should live; and that the Release might not bar her of that, because not intended when the Release was given; nor was the Lease then looked on as part of the Personal Estate.

A Release set aside by a subsequent Accident having relation to the Original Equity.

1 Quest. was, Whether, the Inheritance being gone, the Lease which was to attend it, should go now, according to the Use in the Covenant to stand seized?

Resolved in this Case, It being a Settlement in Marriage, and so on a Consideration, it should go to the Wife for so many years as she lived. But it was said, it would have been another Case between the Heir and Executor of the Covenanters.

2 Quest. If the Release of the Demands to the Personal Estate should bar the Feme of the benefit of the Term?

And it appearing by the proof, that the Agreement which begot the Release, was before the Title to the Inheritance was avoided, and concerning that which was then look'd upon as personal Estate, and not touching the Lease; and that notwithstanding the Release, the Feme continued the possession: it was resolved the Release should not bar or prejudice the Plaintiff's Title in Right to the Lease. And it was decreed, That the Plaintiff should hold for so many years as she lived; and that if the Lease were renewed, she paying proportionably to her Estate for Life, that the Joynturess should hold for so many years as she lived, and then to go to the Executors.

A. seized of a Term for years, purchases the fee, and then settles on his Wife for Jointure, and dies; The Wife releases to the Executors all her Right to the Personal Estate, and afterwards the Fee is evicted, and notwithstanding the Release, the Wife decreed to hold during the Term.

*The Lord Chancellor.
Judge Brown.
The Master of the Rolls.*

Kinaston against Maynwearing. May 4.

The Plaintiffs were the Children of the Defendant's Sister; and the Defendant's Mother, during his Minority, as his Guardian managed his Estate. And as to the Lands in question, it was pretended those were settled by the Defendant's Father on the Plaintiff's Mother, being the Defendant's Sister; and the Defendant's Mother and Guardian for about two years before the Plaintiff's Mother's Marriage, put her into possession of those Lands, and

Equity raised out
of a Deed which
was not proved.

and upon her Marriage articulated that those Lands should be settled on her and her Heirs; and to those Articles the Defendant, then an Infant, was a Witness. Upon this matter (tho' there was no proof of the Deed whereby it was pretended the Defendant's Father settled the Lands upon the Plaintiff's Mother) the Court decreed against the Defendant, upon colour of Equity for want of the Deed, and yet there was no proof of a Deed, which was conceived very hard, for the Court to raise an Equity out of a Deed when it it was not proved.

*The Lord Chancellor.
Master of the Rolls.*

Thirveton against Collier. May 11.

*Hardr 131, 132, 133.
22, 118, 104.
2 Vent. 148.
2 Chan. Cases 29.*

The Bill was, to have a Decree for an Inclosure upon an Agreement. It appeared by the Bill, That there were to be eighteen Allotments, and there were but fifteen parties to the Suit; And so it was objected by the Defendants, That all the parties to the Agreement were not parties to the Suit; and also that there were other persons that claimed Common in the Ground to be inclosed, that were not parties either to the Agreement or Suit; and so to decree that Agreement, would be to do a manifest Wrong, and be an occasion of Suits and Quarrels.

Whereunto it was answered by the Plaintiffs, That tho' there were eighteen Shares, some of the persons were to have two Shares, so as that made up the eighteen; and that there were others had Common but by Vicinage: But nothing of this appeared to be alledged by the Plaintiffs.

Agreement to in-
close Common,
parties that have
Interest in the
Common, and
not privy to the
Agreement, shall
not be bound.

It was decreed nevertheless, That the Agreement for the Inclosure should be performed, and a Commission was awarded to set out each person's Title. And the Court decreed, That if there were any that had Interest, and were not parties to the Agreement, they could not be bound, and so at no prejudice: but however, it should not be in the power of one or two wilful persons to oppose a Publick Good.

The

The Lord Chancellor.
The Master of the Rolls.
Justice Windham.

post 213.

Goodrick against Brown. May 11.

1. **R**esolved, That whereas by a Decree of this Court a Fine was levied to a particular end and purpose, which would operate farther in point of Law, than to that end which the Decree ordered it, That such Fine should not be suffered in Equity to work farther than the Decree intended.

Fines pursuant to a Decree shall work only according to the Decree.

2. That the Fine or Recovery of a *Cestui que Trust* should bar and transfer the Trust, as it should an Estate at Law, if it were upon a Consideration: But otherwise Justice Windham doubted of it; for he said he look'd upon this Court as remedial to those that come in upon a Consideration, &c.

Fine and Recovery shall work on a Trust as on an Estate at Law.

3. That whereas the person that suffered the Recovery was Tenant for Life, in point of Law, and there had been an Agreement precedent to the Recovery, by the Ancestor that was dead, for the settling of the Premises, so as to have made the Tenant for Life Tenant in Tail, That the Recovery should be good in Equity, and should work upon the Agreement.

Equity only remedial to those that come in upon consideration.

Against which it was objected, That the Recovery was a wilful Forfeiture in point of Law, and was voluntary, and no Consideration; and so the truth appeared, that the Defendant was as near in Blood to the first Ancestor as the Plaintiff; and if this Court would maintain a voluntary Recovery of a Trust raised upon a Conveyance, there was not so much in this Case; for here was but an Agreement, and though that Agreement might upon a Bill have been decreed, yet there being never any such Bill, the Recovery ought not to be supported. As to this point and the second, the Judge would not deliver any Opinion, but the Court decreed it.

A wilful Forfeiture by suffering a Recovery in point of Law, supplied and holpen in Equity.

D

At

At the Rolls. The Master of the Rolls.

Scot against Rayner. May 11.

Issue, whether a
person to whom
another had got
Administration,
was dead or not.

The Defendant had sued the Plaintiff at Law on a single Bond entered into by the Plaintiff to the Defendant's husband, the Defendant suing there as Administratrix to her late husband. The Bill here was, That in truth the Defendant's husband was not dead, and there appearing some probable Evidence that he was not dead, but concealed himself, and the Defendant pending this Suit having got Judgment against the Plaintiff, the Court awarded an Injunction to stay Execution, and directed a Trial at Law to be, Whether the Defendant's husband was dead or not.

*The Lord Chancellor.
Judge Brown.*

Wan against Lake. May 12.

On a Demurrer.

Fol. 96.

A Subpœna no
Record, nor
ought to be de-
murred unto.

The Demurrer was to a Subpœna in nature of a Scire fac', and it was because he that brought the Subpœna did not thereby alledge himself to be Heir or Executor to him that had the Decree.

Resolved, That there never was any Demurrer of this nature before: And the Subpœna was no Record, nor any where filed, and so not to be demurred to: But the Cause was to be shewed upon the Return of the Writ on the Order, and the Order did mention him that brought the Writ to be both Heir and Executor. So this Demurrer was conceived very ridiculous, and over-ruled.

The

*The Lord Chancellor
Judge Brown.*

Freak against Hearsey. May 12.

On a Demurrer.

The Heir of the Mortgagee exhibited a Bill to have the Mortgagee pay the Money, or to be decreed to make further Assurance, and be foreclosed of Redemption. The Demurrer was, because the Executor of the Mortgagee, who might have a Title to the Mortgage-Money, was no party; and the Demurrer was allowed.

Executor of the Mortgagee ought to be a party where the Heir sues to have the Money paid, or the Mortgage foreclosed.

In Court. The Master of the Rolls.

Glover against Portington. May 14.

Jos Glover (the Plaintiff's Father) for securing 50l. per annum to Anne his Mother-in-law for life, in lieu of 50l. per annum which she had chargeable on other Lands of his which he was about to sell, 11 May, 13 Car. 1. surrenders certain Copyhold-Lands (of Gabelkind) to Thomas Roll (Brother of Anne) and his Heirs, in Trust for Anne, upon condition, that if Jos Glover, his Heirs or Assigns, paid Anne 50l. per annum during life, the Surrender to be void. Thomas Roll was admitted; Jos Glover failing to pay the 50l. per annum, 4 July, 20 Car. 1. Thomas Roll surrendered the Premises to the use of Anne for life, the Reversion to himself and his Heirs (but in Trust for her and her Heirs,) She was admitted: Thomas Roll died, the Premises descended to his Children and Grandchildren, some whereof yet Infants, and one a Lunatick. 22 Jan. 1651. Anne by Will directed that the Arrears of the 50l. per annum should be paid to her Executors (which the Defendant Portington is) to such purpose as therein is expressed, and

declared that her Nephews the Sons and Grandchildren of Thomas Roll should permit her Executors to receive the Rents and Profits towards payment of Legacies, and appoint her said Nephew and Grandchildren, that if the Plaintiff (being Heir of Jos. Glover) should within three years after her death pay her Executor all Arrears of the 50l. per annum, that they should surrender to the Plaintiff and his Heirs, and remit the Plaintiff 100l. thereof, and the Interest of the whole, so as he paid the Arrears in three years; and declared, that if the Plaintiff failed to pay the Arrears in three years, the Premises should be surrendered to her Executor; and the Arrears being paid, she willed her Executor to pay the Overplus to the Plaintiff, and to surrender to him. And in July 1654. Anne died, and in February next following the Bill was exhibited to have a discovery of what was paid, and that paying all Arrears but the 100l. and Interest, he might have a Surrender from Rolls, who claimed the Estate to their own use. This Cause was, through Infancy of the Defendant so delayed, that their Answers could not be gotten, and through absence of the Plaintiff out of England, which was nigh ten years; and now it was decreed, That if the Plaintiff would redeem, he should pay all the Arrears and Interest.

Serjeant Fountain drew a Petition to the Master of the Rolls to re-hear it on the point of Interest, and afterwards moved it in Court; and the Lord Keeper (the Master of the Rolls being present) recommended it to him to re-hear it; and as to the point of the 100l. of the Principal which was to be abated by Will, the Bill came within six months after the death of Anne, and it was not safe to go to hearing without the Trustees, whereby to have a Surrender, and they were in Infancy and Lunatick, which was the principal Reason the Cause depended so long.

Serjeant Fountain did upon a Discourse between him and A. B. agree it was against the Plaintiff as to the 100l. (tho' Churchill was clear of another Opinion) for Serjeant Fountain said, That it being a voluntary conditional Gift, the Plaintiff ought, if he would have the benefit of it, to have performed it by payment within three years, and sought a Re-conveyance after: But as to the matter of the Interest, that was stronger; for that the Will appointed that the Arrears being paid, the Land should be surrendered to the Plaintiff; and it was said, the Testator intended a benefit to the Plaintiff by the appointment; and if he should pay the

Mortgagee remits by Will part of the Mortgage-money and all the Interest if the rest be paid in three years.

The Mortgagor failing to pay within 3 years, loses the benefit of the Bequest.

the Arrears and Interest, it was no benefit, for then the Premises without such appointment ought to be surrendered to the Plaintiff, for the same were not forfeited above ten years when the Bill was exhibited.

The Master of the Rolls, upon the Re-hearing, 25 June, Car. 2. confirmed the first Decree. Serjeant Fountain, Master Churchil and Master Keck for the Plaintiff. Master Solicitor Finch, and divers others, for the Defendants. And afterwards there was a Bill of Review to reverse this Decree; to which Portington demurred, and insisted there was no Error in the Decree. And this Demurrer was argued in Trinity-Term, 1665. before the Lord Chancellor and Baron Rainsford. And in the Debate it was insisted by the Defendant's Counsel, That this was a Bill of Review of a strange nature; for that the Plaintiff, who had the Decree, did by his Bill of Review complain, that he had not enough decreed; whereas if a Review lies, it lies only for him against whom the Decree or Dismissal is. After long debate, the Demurrer was over-ruled.

DE

D E
Term. Sanct. Trin.
Anno Regis 16 Car. II.
I N
CANCELLARIA.

*The Lord Chancellor.
Baron Rainsford.*

Combs against Proud. June 16.

The Bill was a Bill of Review; and in drawing up the Decretal Order, the matter upon which the Decree was made was declared to be proved, and the Case stated far different from the Fact.

Matters assigned for Errors in a Decree must appear in the Decree it self; for being of Record, must be tried by it. If the Fact be mistaken at the hearing and Decretal Order, that must be rectified by rehearing, and not otherwise.

The Errors assigned by the Bill were, That the Decree was grounded on matters not proved, and instanced in particulars, and that the matters mentioned in the Decree to be proved were not proved, &c. The Demurrer was general, That the Decree contained no Error in Law, and that the Matters alledged for Error were but Mis-judgment. And upon debate it was declared, That upon a Bill of Review, the Causes for Review must arise and appear upon the Case as it is stated in the Fact; and that the Fact must be admitted as it is there stated; and that touching where the Fact is mistaken, upon which the Court grounded their Judgment, it is proper in such case for that reason to have the Cause reheard before the Decree be enrolled: Yet after the Decree enrolled, that is no ground for a Bill of Review;

view; for the Decree inrolled is matter of Record, and can be tried by the Record it self after it is inrolled, and must be taken to be true; and so the Demurror was allowed.

*Lane 69. Hard. 51.
1 Roll. Abr. 382. 2.
Pl. 2.
Lane 70. Ant. 45.*

The Original Case of *Comb and Proud* was as follows.
It was heard at the *Rolls* in November last.

The Original Bill was to be relieved against an Account stated between the Mortgagor and the Petr of the Mortgage, under Hand and Seal, upon Suggestion, That it was agreed upon the sealing, that if there were any mistake in the Account, the same should be reviewed and rectified. The Defendant denied the Agreement, and pleaded the Account stated, and three Meetings in order to it, and the same perused first by the Plaintiff, and affirmed on his behalf, and then fully consented to and sealed. Issue was taken on the Plea, and the Plea was proved: Yet it appearing to the Court by the quantum of the same, that the Account was made up of Interest upon Interest, and the Court taking the Agreement to be proved, (howbeit it was not) decreed the Account stated to be set aside, and the parties to go to account ab origine.

Observe, the reason why the Review did not lie, was, because, as the Decree was drawn up, there was no Error appeared in it.

The Lord Chancellor.

The Master of the Rolls.

Bolton against Arme. June 17.

A Lessee of the Crown made an Under-lease of a Rent; during the Usurpation the State voided the first Lessee's Estate, and exposed the Crown-Interest to sale. The Under-Lessee applies to his Lessor for Protection; he bids him shift for himself; thereupon the Under-Lessee pays his Rent to the Purchaser from the State for some time, and after the Under-Lessee purchases his Tenement from him that purchased of the State. Upon the King's Restoration, the first Lessee brings Debt against his Under-Lessee for the Arrears of Rent from the time he discontinued payment to him, and had Judgment by default. The Under-Lessee prayed to

A Judgment for a matter discharged by Act of Oblivion, decreed to be vacated.

Court of Equity a
proper Interpreter
of a Statute.

to be relieved against this Judgment, which was by the Bill alledged to be by surprize, though no surprize appeared in obtaining the Judgment. Decreed, That the Judgment be vacated, for that the Rent was discharged by the Act of Oblivion; Of which, the Lord Chancellor said, a Court of Equity was as proper a Judge or Interpreter as the Judge at Law.

Williams against Owen and Arthur. June 24.

On a Demurrer to an Answer.

Ant. 30.

Demurrer to an
Answer.

The Defendant having answered the Bill of Reverser, which sought to revive the Order on hearing, as to so much as was not within the Decree inrolled, had by his Answer set forth Matter that tended to draw into question and new examination an Agreement which was contained within the Decree as it was inrolled, and thereby fully settled. Therefore to so much of the Answer as tended again to draw into examination the Matters settled by the Decree inrolled, or by the Order on hearing, the Plaintiff did demur, for that it would be of evil consequence, and introductive of Perjury, to permit a re-examination of any of those matters. Upon debate of this Demurrer, which was drawn by Serjeant Fountain, it was averred by the Defendant's Counsel, That a Demurrer to an Answer was never known before in a Court of Equity, (though Serjeant Glyn for the Plaintiff affirm'd he had known of a Demurrer to an Answer before.) And though it did seem unreasonable to the Court that a Defendant should by Answer draw again into examination the Matters formerly examined unto and settled, yet the Court doubted what to do as to the Demurrer. Some at the Bar said, The Court should have been moved in this Special Case for an Order to restrain an Examination of all Matters formerly examined and settled. And it was now ordered that there should be no Matters re-examined, that were examined to before. This, I take it, was the Rule that was given; *tamen quare.*

The

*The Lord Chancellor:
Baron Turner.*

Nicholson against Sherman. June 24.

On a Demurrer.

A. Bequeaths a Legacy, and makes Baron and Feme his Executors, and dies: The Baron afterwards makes his Will, and makes the Feme and his Son Executors, and dies: The Legatee of A. exhibits his Bill against the Feme and her Son, setting forth the Case, *ut supra*, and chargeth, That the Estate of A. liable to the payment of the Legacy, is come all to the hands of the Feme and her Son. The Demurrer was by the Son, for that the Feme, who was the surviving Executor of A. was only liable to his Legacies, and the Son being Executor of one of A's Executors that died first, leaving an Executor of A. to survive, was not p^{ro}xy in Law, nor accountable for the Estate of A. which though it be so in point of Law, yet inasmuch as it was charged that the Son had gotten the Estate of A. the Demurrer was over-ruled, the Court declaring that the Estate of A. in whose soever hands, ought to be liable to his Legacies.

The Testator's Estate, in whose soever hands, liable in Equity to his Legacies.

And in Trinity-Term, 1665. this Cause was heard and decreed.

I

DE

D E

Term. Sanct. Mich.

Anno Regis 16 Car. II.

I N

CANCELLARIA.

The Lord Chancellor.

Fleming against Walgrave. October 28.

A Trust for raising Money for a Feme Sole if she marry with consent of the Trustees; and if not, such as the Trustees shall name, or else to themselves, shall enure to the Administrator of the Feme Sole.

The Case was thus: 900 was secured by a Lease for years for a Feme Sole, in case she did not marry contrary to the liking of Sir Edward Walgrave and his Lady; and if she did, then to such persons as Sir Edward and his Lady, or the Survivor of them, should nominate; and for want of such nomination, then to Sir Edward Walgrave and his Lady, and the Survivor of them; and in this case Sir Edw. Walgrave and his Lady were Lessees in Trust. The Feme Sole married without their consent; Sir Edward dies without any appointment, and so did his Lady who survived him, and had after the death of Sir Edward made a general Deed of Gift of all her Goods and Chattels to one Sandal. The Question was between Sandal and Francis Copledike, Who was Administrator to the Lady, and also to the Feme Sole, who should have the benefit of this Lease? The Court was of Opinion, That it was not in the power of Sir Edward and his Lady to have disposed of this Lease otherwise than for the benefit of the Feme Sole if she had lived; and that Francis Copledike, as Administrator to her, and also to the Lady, was well entitled to the benefit of the Lease, and so decreed it.

The

*The Lord Chancellor.**Lord Chief Justice Bridgman.*

Dickenson against Knowell. November 3.

The Plaintiffs were bound to one Crofts (to whom the Defendant was Executor) in 600 l. for the payment of 300 l. Crofts was sequestered by the Usurper, and for 300 l. which the States owed the Plaintiffs, they had an Order from the Committee to retain the 300 l. of Crofts for satisfaction. The Bond was upon the King's Restauration put in Suit; to be relieved against which, was the scope of the Bill. The Question was, Whether the Defendant was barred by the Act of Oblivion?

Bridgman being present, he declared, he conceived that the Defendant, inasmuch as Crofts still kept the Bond, and the Money was not actually paid, but retained, was not discharged by the Act of Indemnity. But it was referred to make a Case.

An Act of Indemnity makes good only actual payments.

At the Rolls.

Rand against Cartwright. November 3.

A Man makes a voluntary Deed, and then a Mortgage of the same Lands. The first Deed upon a Trial at Law is found fraudulent; he to whom the Deed is made, exhibits a Bill to redeem the Mortgage.

It was held, That though the first Deed was fraudulent, because voluntary quoad the Mortgage-money, & pro tanto, yet that it was good as to the Equity of Redemption, and would pass that; for that a voluntary Deed will bind the party that makes it, and his heirs. But the matter was compromised.

A voluntary Conveyance precedent void, quoad a Mortgage subsequent, prevailed so as to pass the Equity of Redemption.

Justice Archer.

Rennesey against Parrot. December 15.

On a Demurrer.

Legacies payable
at 21, and no
maintenance in
the mean time.

The Plaintiffs were Legatees, their Legacies to be paid at twenty one years of age. They suggest they had no maintenance, and by their Bill a Guardian prays, That the Defendant, who is the Executor of the Will, may allow them Maintenance.

Q. What Equity
may do in this
Case.

The Defendant demurred; for that the Plaintiffs were under age, and their Legacies were not to be paid till twenty one, and so had no cause of Suit.

Collins for the Defendant, and none for the Plaintiff. The Demurrer over-ruled.

The Lord Chancellor.

Crispe against Nevil. December 16.

When the first
Answer is report-
ed insufficient, the
Defendant if he
answer again,
without except-
ing, is to answer
all the Points ex-
cepted, tho' the
same exceed the
Bill.

The Plaintiff excepts to the Answer. The Exceptions are referred. The Master certifies the Answer insufficient in the Points excepted to. Then the Defendants fully answer to the Charge of the Bill. But in truth the Exceptions were longer than the Bill. The Master upon a Reference to the second Answer, reports the Answer insufficient in the Points excepted unto. The Defendants except unto the Report, and upon debate the Defendants Counsel insisted they had answered well to the Bill, and that they ought not to be put to answer any Matter but what is in the Bill. But the Plaintiff's Counsel insisted, That inasmuch as the Defendants did not except against the first Report, but had since answered, they had admitted they ought to answer to all the Matters of the Exception; and so it was ruled.

DE
Term. Sanct. Hill.

Anno Regis 16 & 17 Car. II.

IN
CANCELLARIA.

The Master of the Rolls.

Cocker Knight, and the Lady Elizabeth his Wife, Daughter and Heir of Edmund Ludlow, Son and Heir of Henry Ludlow, against Bevis. Jan. 23.

UPON hearing and debating the Matter in question between the said parties this present day, in presence of Counsel learned on both sides, the substance of the Plaintiff's Bill appeared to be, That Henry Ludlow having borrowed the Sum of 2000 l. of Peter Bevis, the Defendant's Father, did for security of 1000 l. thereof, by Indenture dated Sept. 25. an 5 Car. 1. demise unto the said Peter Bevis the Manor of Kingston Deveril, with its Appurtenances, for the Term of 99 years; and for security of the other Sum did by Indenture the 7th of the same month in the year aforesaid, demise several Woods called Sawley, Eulel and Ely, and divers Grounds, unto the said Peter Bevis for the Term of 99 years aforesaid. And that the said Peter Bevis, by Indenture 29 Octob. 5 Car. 1. did re-demise the said Manor of Kingston Deveril, with the Appurtenances, unto the said Henry Ludlow

Ludlow for the Term of 99 years, rendering a yearly Rent unto the said Peter Bevis of 100l. at Lady day and Michaelmas, by equal portions, during the life of Susan the Wife of the said Peter Bevis, and Richard Cubbel, and the longest Liver of them; and by another Indenture dated 9 October in the same year, did re- demise the said Woods and Grounds unto the said Henry Ludlow for the same Term, rendering unto the said Bevis 100l. per annum, during the life of Richard Bevis, William Bevis, and Sebastian Isaac; which said Lands at the time of the aforementioned Grants were worth to be sold 8000l. and that for six years and an half the said Henry Ludlow did duly pay the said Rent, amounting to 1300 l. and that for nonpayment thereof, about the year 1640. the said Bevis made his Entry, and received the Profits thereof; whereupon John Ridout Gent. and Elizabeth his Wife, formerly the Wife and Executrix of Edmond Ludlow, together with the now Plaintiffs, about Easter-Term, 1650. exhibited their Bill into this Court to have a Redemption of the said Mortgage, paying what should appear due on the said Account.

Upon hearing of which Cause in Novemb. following, it was ordered and decreed by the consent and agreement of the parties, that the then Plaintiffs should pay all the Arrearages of the said Rents at 160l. per ann', and that upon payment thereof the said Bevis should re-convey the said Mortgaged Premises unto the then Plaintiffs, or to whom they should appoint, and to that end did appoint an Account to be taken by Mr. Rich, then one of the Masters of this Court; and what he should find due was to be paid, 200 l. thereof at Christmas then following, and the residue at the end of six months and six months then next following, by equal portions: Pursuant to which Order, the said Master certified there was due to the said Bevis the Sum of 4640 l. which Sum was made up of Interest during the late Troubles at 8 l. 10 s. per Cent. which said 200 l. was duly paid at the time prefixed for that purpose. But the Plaintiff being a Colonel in the King's Army, and about the time allowed for the latter Payments being engaged in his Majesty's Service at Worcester, was forced to leave the Kingdom, and thereby disabled to make satisfaction according to the Decree; Nevertheless did write to the said Bevis to sell part of the said Lands, and pay himself what was due to him, who accordingly sold unto Sir James Thynn and others so much of the said Premises as raised the whole Money,

Money, and yet continued the Possession, and received the whole Profits of the residue of the Lands, and about four years since died, whereby the said Premises came unto the Defendant his Son, as Administrator of the said Peter Bevis his Father, who continues the Possession thereof: Therefore that the said Defendant might come to an Account with the Plaintiff for the Residue Profits by him received, and that he may re-convey the Mortgaged Premises to the Plaintiff, or to whom he shall appoint, he being willing to satisfy the Defendant if any thing shall be found due to him on Account, is the scope of the Bill.

Whereunto the Counsel for the Defendant insisted, That there was such a Decree as in the Bill set forth, and that for the nonpayment of the Money computed due, which consisted only of the Arrears of Rent, without any Interest for the same, the said Decree became absolute: upon which the said Defendant rested satisfied, and the Sale made to Sir James Thynn was not pursuant to such Letter sent by the Plaintiff, but sold on the said Peter Bevis's own Account, and wherein the said Peter Bevis hath given a general Warranty, wherein he hath bound himself and his Heirs in Perpetuity, which he would not have done for a third person's advantage.

This Court nevertheless, after long debate of the Matter, and hearing what could be alledged by Counsel on either side, and reading of the whole Proofs taken in this Cause, and of the Decree made in the former Cause, which appeared to be made by consent, was fully satisfied that the Decree was in the nature of a Mortgage, and but a Security for Money, although the same was made absolute, and the said Lease to Mr. Bevis confirmed. And inasmuch as the Consent and Agreement of the said parties was in part executed by the payment of the said 200 l. and the Conditions of the Times being then such, that, as appeared by the Defendant's own Proofs, that part of the Lands could not be sold, by which the Plaintiffs could not make satisfaction of the said Decree, notwithstanding a continued endeavour appeared in the Plaintiffs to that purpose, as his desire of Sale of part of the said Premises to Sir James Thynn, and Sale made by the said Mr. Bevis, and much Moneys received by him, by Fines and otherwise, of some of the Tenants of the said Manor. And it also appearing that this Court hath very often in such-like Cases of inevitable necessity, and no wilful default appearing in the Party,

Decree in nature
of a Mortgage.

Where a Decree to foreclose the Money not paid, the Court in cases of inevitable necessity will enlarge the time, tho' the Decree be signed and inrolled.

The Decree avoided by Original Bill upon matter subsequent to the Decree.

Party, enlarged the time as to the performance of the Decree, notwithstanding such Decrees have been signed and inrolled; and this appearing to be new Matter subsequent to the said Decree, was also satisfied the Plaintiffs are capable of Relief in this Court, and do therefore think fit, and so order and decree, That both parties do proceed to an Account; and that it be taken by Sir Thomas Bird Knight, one of the, &c. And the Plaintiff is at liberty to take out a Commission in the Country for proof of any thing relating to the said Account; upon which Account the Master is to allow unto the Defendant the whole Money decreed, with damages for the same since the time the same should have been paid by the Decree, deducting the 200*l.* already paid as aforesaid; and that the said Defendant Mr. Bevis do also account before the said Master for what he really made and received of the said Manor of Kingston Deveril, by granting Estates or otherwise; as also the Profits made by the Woods called Sawley, &c. by the Defendant and his Father, before Sale thereof unto Sir James Thynn; and also in making and confirming the Tenants Estates in the said premises, which said Estates, together with the aforesaid Sale to the said Sir James Thynn, the Plaintiff is hereby decreed to confirm, and to discharge the Defendant, his Heirs, &c. of all Covenants entered into thereupon, &c. And the said Master is to appoint a time and place for payment of what shall appear due; upon payment whereof, it is decreed, the Defendant shall re-convey the said Mortgaged Premises, unsold as aforesaid, to the Plaintiffs, or whom they shall appoint, freed of all Incumbrances done by him and his Father, or any claiming by, from or under the said Peter Bevis, the Defendant's said Father.

The 18th of February, 17 Car. 2. upon re-hearing the said Cause, the said Order was confirmed.

The Lord Chancellor.

Woollet against Roberts. January 27.

At the hearing, the now Plaintiffs offered a Bill exhibited formerly by the Defendant against the now Plaintiffs in Evidence, to which it was agreed the now Plaintiffs had answered. The now Defendants objected, That

that the Bill ought not to be read for Evidence against them, unless the Plaintiffs could prove it was exhibited by the now Defendants direction or privity; for any person may file a Bill in another person's name. And the Court were of Opinion that it should not be read, unless it were proved to have been exhibited with the privity of the party Plaintiff in it. But the Defendants Counsel did after admit it to be read.

A Bill in another Cause no Evidence against the Plaintiff in it, unless it be proved to be exhibited with his privity.

Justice Tirrel

Sewel against Freeston.

On a Plea and Demurrer.

The Bill was after Verdict in an Action of the Case. The Equity was, That the Defendant had writ a Letter, which the Plaintiffs could not prove at the Trial, which would have discharged the Plaintiff; and to set forth the substance of it, and that the matter lay only in the Defendant's Cognizance, and ought to be answered; and that the Plaintiff's Witnesses were beyond the Seas.

The Plea was of the Verdict, and that the effect of the Letter was given in Evidence at the Trial, and Demurrer was for want of Equity.

On debate, it was insisted, That there was no any President of a Bill in like Case after Verdict had before Merdian might be proper for a discovery. Payton and Humphreys Case was cited for the Plaintiff; but answered, That was for matter discovered after the Trial, but no such matter pretended here; And as to the Allegation of the Plaintiff's Witnesses being beyond Seas, if the Plaintiff could not have sworn at the Trial, it was answered, That upon an Affidavit of that at Law, the Court there would have stayed the Trial; And the Case was referred to Presumptions; and after the Plea and Demurrer allowed.

A Bill after a Verdict in Case, on suggestion of matter in Defendant's cognizance, which the Plaintiff could not prove at the Trial.

D E

Termino Paschæ.

Anno Regis 17 Car. II.

I N

CANCELLARIA.

Gower against Balcinglafs. May 26.

Counsel ordered
to have a sight of
the Interrogatories
to which the De-
fendant was to be
examined.

The Bill was to discover a Writing, which 'tis sup-
posed the Defendant the Lady Balcinglafs had con-
cealed, she having gotten a Trunk of Writings by
a Trick from a Master of the Court. The Defendant had
put in four insufficient Answers, and delayed the Plaintiff
eight years; and upon the fourth insufficient Answer, was
ordered to be examined upon Interrogatories; and now, upon
motion, ordered that one of her Counsel should attend in the
next Room when she was examined, to advise her in any
matters of Law if she should need it. And afterwards, on
another day, ordered on debate, That her Counsel should
see the Interrogatories, but not have a Copy.

Love

Love and others, against Baker, Roll, and Clutterbuck.
May 28.

The Defendants brought a Joint-Action at Leghorn against the Plaintiffs, and had there arrested the Plaintiffs Goods. The Defendant Baker being here, and the other Defendants at Leghorn, Baker answered here, and by Order a Subpoena left with him was to be good Service for the other Defendants, and thereupon an Attachment for want of an Answer; and upon this an Injunction was granted to stay the Defendants Proceedings at Leghorn. Now the Defendants moved to dissolve the Injunction, and insisted it was a new Case.

A Subpoena serv'd on a Defendant here, ordered to be good Service for the other Defendants beyond the Seas.

The Lord Chancellor conceived it to be a dangerous Case to stay their Suit there, and so deprive them of their Remedy. To which it was answered, All parties might have Justice, and be fully heard in this Court: but the Plaintiffs would be without Remedy, if the Defendants proceeded at Leghorn, and got possession of their Goods. And the Court declared they would advise with the Judges herein; and afterwards the Lord Chancellor declared, he had advised with the Judges, and that they were of Opinion the Injunction ought to be dissolved. Sed quare, for all the Bar was of another Opinion. It was said, The Injunction did not lie for Foreign Jurisdictions, nor out of the King's Dominions. But to that it was answered, The Injunction was not to the Court, but to the Party.

The Lord Chancellor.

Smith against Pemberton. May 30.

The Mortgagee had assigned the Mortgage. The Mortgagee comes to redeem. The Question was, If what was really due to the Mortgagee when he assigned, for Principal and Interest, and paid him by the Assignee, should be taken as Principal, or so much only as the Mortgagee first lent?

R 2

Ordered,

All Money really due and paid by the Assignee to the Mortgagee, to be taken as Principal against the Mortgagor from the time of the Assignment.

Ordered, That all Moneys really paid by the Assignee, that was due to the Mortgagee, should be Principal to the Assignee. But the Account between the Mortgagee and Assignee was not to conclude the Mortgagor, but the Master to see what was really due at the Assignment, and whether he had really paid the Money; for if the Assignment was colourable, it would be otherwise.

The Lord Chancellor.

Chief Justice Bridgman.

Baron Turner.

The Master of the Rolls.

Lord Digby against Langworth. May 30.

Trust. Whether a Recovery by Tenant in Tail, with Remainder in Tail to another, shall bar the Remainder.

Whether Tenant in Tail of a Trust, Remainder in Tail to another; if the Tenant in Tail by suffering a Recovery, that Recovery shall bar the Remainder, which is no settled Interest vested.

Bridgman was of Opinion it should not. But it was referred to a Case, and the Judges to consider of it. See the Case of Goodrick and Brown before, fol. 49.

The Lord Chancellor.

Chief Justice Bridgman.

Judge Archer.

Sherly Esquire, against Fagg. June 1.

Upon a P L E A.

The Plaintiff by his Bill made Title to the Lands in Question by an Intail of his Great-Grandfather, 9 Jac. whereby the Premises were limited to the Great-Grandfather for Life, Remainder to the Plaintiff's Grandfather by Name for Life, Remainder to the Plaintiff's Father by Name for Life, Remainder to the first Son (which the Plaintiff is) and other Sons in Tail, and shews how by

by virtue of those limitations the Great-Grandfather, Grandfather and Father did enjoy during their respective Lives, and the Plaintiff's Father died about ten years since, the Plaintiff then an Infant of ten years old; and that the Plaintiff ought to enjoy by that Settlement. And the Bill complained that Sir John Fagg and the rest of the Defendants had entered into several parts of the Premises, and did divide the same among them, having gotten the Evidences and the Settlement, and did conceal the same; which the said Sir John had gotten into his hands from one Walter, for a Reward to him, or otherwise; and he had altered and confounded the Bounds and Names of the Land: And so to have a Discovery of Evidences, and the Deed of Settlement, and delivery up of the same, was the scope of the Bill.

The Defendant Fagg pleaded, That for 6870l. yearly paid to the Earl of Thanet, he purchased the Premises of him by good Conveyance at Law; and demands Judgment, Whether he shall further discover his Title, or any Deeds or Evidences to weaken it? And upon long debate, after a Case stated, the whole Court was of Opinion that the Plea was good.

A Purchaser from
A. of Lands which
B. makes Title to,
getting the Deeds
making out B.'s
Title, is not bound
to discover them.

2 *Chans. Caster* 4,
133, 134

The Bill being to be referred against an Amendment from and Articles, and to have them up. Upon hearing, ordered that the Defendant do within a certain time (viz) one year, bring his Motion, and go to Trial thereupon for his Damages: or in default thereof the Plaintiff and Articles to be answered up. And the Court that such given bond, & that it is true to the Defendant's report to say his Motion as long as he pleases, he may say till the Plaintiff's Counselled with bond. And it was

The Matter of
done within a
short time to the
his Appearance
Indemnity, or else
to deliver 'em up.

D E

D E

Term. Sanct. Hill.

Anno Regis 17 & 18 Car? II.

I. N

CANCELLARIA.

The Lord Chancellor.

Baker against Shelbury. 10 February.

The Master ordered within a short time to sue his Apprentice's Indentures, or else to deliver 'em up.

The Bill being to be relieved against an Apprentice, Bond and Articles, and to have them up. Upon hearing, ordered that the Defendant do within a certain time (viz.) one year, bring his Action, and go to Trial thereupon for his Damages; or in default thereof, the Bond and Articles to be delivered up. And the reason that was given was, That if it were at the Defendant's choice to stay his Action as long as he pleased, he would stay till the Plaintiff's Witnesses were dead. And it was said it was usual in the Case after Apprentices were out of their Time, to exhibit a Bill to put their Master to sue their Covenants within a certain time, or else to deliver up their Indentures.

The

The Lord Chancellor.

Digardine against Swift. February 22.

UPON a Motion, it was ordered, That where one of the Bail at Law for the Plaintiff had prosecuted a Suit in Equity in the Plaintiff's Name in his absence, the Plaintiff not being to be found, and the said person his Bail acting throughout the Cause in this Court as Party and Solicitor, that the Solicitor should pay the Defendant here his Costs. But this was in respect he was Solicitor and Prosecutor, and not as Bail; for there being other persons that were Bail, the Court declared they would not charge them with the Costs. And the Master of the Rolls, to whom this matter was formerly moved, as concerning the Solicitors paying the Costs, desired to see Presidents before he made any Order; and declared in this Case, That if there were any one President, he would make the second.

The Solicitor to pay the Costs where the party absents himself.

*The Lord Chancellor.**Justice Windham.**Baron Turner.*

Drake against the Mayor of Exon. February.

A Lessor and Lessee for years, the Lessor covenants with the Lessee and his Assigns to renew, then the Lessee becomes Bankrupt, and Commissioners of Bankrupt assign this Covenant. The Assignee brought this Bill to have the Defendant, the Lessor, renew to him. The Case was referred to Justice Windham and Baron Turner, and they certified the Plaintiff ought not to be relieved; and so he was dismissed.

Commissioners of Bankrupt cannot assign a Covenant in a Lease to renew.

Serjeant Nudigate, who was Counsel in this Case for the Defendant, said, It had been ruled in this Court, that Commissioners of Bankrupt might assign an Equity of Redemption of a Mortgage. But quære; for it seems to be

Q^a. Whether they can assign an Equity of Redemption?

be against the Statute, which enables them to the benefit of a Condition that is performed, and not forfeited.

The Lord Chancellor.
Judge Windham.

Lawrence against Brasier.

Money payable
by Condition of a
Bond, moderated
in respect of the
Office, out of
which it was to
issue, taken away.

A Bond was entered into before the Wars, conditioned to pay 40 l. per annum for twelve years out of the Profits of an Office, which was taken away by the Statutes. And the Obligor being sued on the Bond, and the Office revived, he exhibits his Bill to be relieved against the Bond. The Obligee insists, That the Office continued some part of the twelve years, and being now revived, the Obligor ought to pay the 40 l. per annum for twelve years, or be dismissed; for the Obligor having the Law with him, ought not to be hurt in Equity, without satisfaction according to the Condition.

It was decreed, That the Obligor should pay the 40 l. per annum for so many years as the Office continued, and there-upon the Bond to be delivered up.

D E

Termino Paschæ.

Anno Regis 18 Car. II.

I N

CANCELLARIA.

The Lord Chancellor.

Baron Turner.

Terwit against Gresham. March.

O Rdered upon long Debate, That Depositions of Witnesses taken in a former Cause thirty years since, where the same Matters were under Examination and in Issue as in this, (the Point being concerning Incumbrances and Dampnification in both Cases) should be made use of in this Cause, albeit the Plaintiff in this Cause, and those under whom he claims, were not any Parties in the former Cause, inasmuch as the Defendants were then Parties, and the now Plaintiff's Title did not then appear, and the Witnesses were dead. And Presidents were cited for this between Trinity-Hall and Doctors-Commons, where Dr. North's Depositions taken in a former ancient Cause, where neither of the now Parties were Party, was read. And the like between Cul-ton and Vaughan.

L

The

Where the Plaintiff being forced to pay the costs of his Advocate, the Defendant recover against the Plaintiff.

Where the Plaintiff being forced to pay the costs of his Advocate, the Defendant recover against the Plaintiff.

Depositions in a former Cause between other parties, read against one that claims not under any of those parties.

Post 175, 236, 233.
Kew. 96. d. b.
Hard. 180. Ant. 25.
Post. 229.
Kew. 100. d.

The Lord Chancellor.

Armitage against Metcalf. May 16.

Where the Heir being forced to pay the Debt of his Ancestor, shall recover against the Executor.

The Cause being heard about 1664. and one Point being, That the Obligor having paid a Debt of his Ancestor's upon Bond, might be reimbursed his Money by the Executor of the Obligor, who had personal Assets, the Heir being forced to pay the Debt by a Suit, it was decreed the Executor should reimburse the Heir as far as there were personal Assets come to the Executor's hand. And upon Exception taken to a Report in this Cause, which came to be heard before Mr. Baron Atkins, 29 Junij, 1668. there was this Point: Whereas A. alone was bound to the Testator, the Executor delivered up the Bond, and took another to himself for the same Debt, whereby, as was alleged by the Council of the Executor, the Security was bettered; And whether this in Equity should be charged as Assets in the Executor's hands, he having delivered up the old Bond? was the Question.

Where the delivering up of a Bond by the Executor, and taking a new Bond to himself for the Debt, is no conversion in Equity to charge the Executor with the payment of that Money.

Against the Executor it was insisted, That the taking the new Bond had alter'd the Property of the Debt, so that if the Executor died Intestate, his Administrator would have the Debt; whereas if it had rested on the old Bond, the Administrator de bonis non of the first Testator should have it subject to the first Testator's Debts. It was admitted that at Law this did charge the Executor as a Conversion and Receipt of so much of the Estate. But it was insisted, That in Equity he having taken the same person, and another bound, and owing to assign the Bond to the Heir, it ought not to charge him, especially when the Heir is Plaintiff in Equity, as here. And it was ruled, That the Executor should not be charged with the Money by altering the Security, but that he should assign the Security to the Heir.

The

The Lord Chancellor.

The Master of the Rolls.

Smallpiece against Anguish. May 25.

The Bill suggested, That the Defendant did endeavour to set up a Will, pretended to be made by one that died in the great Sickness in London, and that the Defendant was Executor of it: whereas there was no such real Will, but obtained unduly, and that was contested in the Spiritual Court; and yet the Defendant in the interim being insolvent, endeavoured to get in the Debts due to the Estate. The Defendant demurred, for that the Bill contained no Equity, and the Suggestion of Insolvency might be made against every Executor. But the Demurrer was over-ruled; and upon Motion it was ordered, That the Debtors to the Deceased's Estate should forbear to pay any Money till the matter settled in the Spiritual Court.

Injunction to Debtors to a Testator's Estate not to pay any Money to a pretended Executor, till his Title to the Executorship were settled in the Spiritual Court.

And note, That upon Examination this was found to be a forged Will, and the Defendant stood in the Pillory for it.

D E

Term. Sanct. Mich.

Anno Regis 18 Car. II.

I N

CANCELLARIA.

In Court. The Master of the Rolls.

Knipe against Jellon. November 13.

The Factor (not
the Employer) to
have the benefit of
stolen Customs.

The Defendant employed the Plaintiff as his Factor beyond Sea, and brought an Action of Account against the Plaintiff here at Law, and had Judgment quod computet. The Plaintiff brought his Bill here to have an Allowance upon Account for what he had saved in not paying the Customs for those Goods (which could not be allowed before the Auditor, as was said); and an Allowance was decreed to the Plaintiff for the same against the Defendant the Employer; and so it was referred to a Master to take the Account. Vide Smith and Oxenden, f. 25. and Borr against Vandale, f. 30.

Hampden

Hampden against Brewer. November 19.

On a Demurrer.

Richard Hampden made the Plaintiff and his Widow Two Executors, under this Condition, That if the Widow married, her Executorship to cease, and the Plaintiff to be sole Executor. The Plaintiff and the Widow exhibited the Bill, to which the Defendant answered, and several Orders were made, one (inter alia) by consent to refer Matters finally to be determined. Then the Widow married, and it became a Question in this Case, Whether the Plaintiff might proceed upon that Bill, (wherein there was no mention that the Widows Executorship was Conditional, but the Bill was by both as Executors General) or whether he must bring a Bill of Reviver? And upon a Reference of that Point to Chief Justice Bridgman, he was of Opinion he must bring a Bill of Reviver; though Serjeant Fountain, upon producing the Will under Seal, whereby it appeared the Widows Executorship was conditional, ut supra, did insist, That there was no need of Reviver. This was the Result of the former Debates.

Two Executors (the one conditional) are parties; the Condition is broken, the other Executor must revive.

A Bill of Reviver was brought, which was to revive all the former Proceedings, and particularly the Order by consent. The Defendant did demur to the Bill, for that it sought to revive that Order, whereas the same was a party to it; and she being married since her Executorship, consequently her consent was determined. And upon Debate (which was the only Work of this day) the Demurrer was allowed.

Demurrer, because more was prayed to be revived than can be.

In Court. The Master of the Rolls:

Underwood against Staney. November 24.

The Obligee in a Bond of twenty years old exhibits his Bill against the Administrator of the Principal and the Surety (upon loss of his Bond.) The Administrator saith by his Answer, that he hath no Assets. Upon hearing the Cause, it was directed to a Trial, Whether the Surety

Obligee in a Bond lost, hath remedy against the Surety in Equity.

had

*Poff. 120.
Larib. 24, 146.*

had sealed and delivered the Bond; and a Verdict had passed against the Surety, (viz.) That he had sealed and entered into the Bond. And the Cause coming back to this Court, and the Plaintiff's Counsel praying a Decree for the Plaintiff's Debt against the Surety, Serjeant Fountain (not of Counsel on either side) said it was doubtful whether Equity should in this Case bind the Surety, who was not obliged in Law, but in respect of the lien of the Bond; and that being lost, and the Surety having no benefit by (nor consideration for) being bound, he thought Equity after so long a time should not charge the Surety. The Master of the Rolls said he would see to moderate and mediate this matter between the parties; in order to which, he was several times attended by the Plaintiff; and the Defendant making default, he decreed for the Plaintiff. And afterwards the Cause was upon a Case made, brought before my Lord Chancellor, who was of Opinion with the Master of the Rolls, and decreed it for the Plaintiff.

Obligee in a voluntary Bond lost, hath Remedy in Equity.

Loss as good a consideration of a Promise, as Profit.

It was in the Debate of this Case said, That if a Grantee in a voluntary Deed, or an Oblige in a voluntary Bond, lose the Deed or Bond, they should have Remedy against the Grantor or Obligor in Equity. Tamen quære. But if so, no mistake in the Principal Case, where the Bond was for Money lent; and though the Surety had no advantage, yet the Oblige had parted with his Money, and Loss is as good a Consideration for a Promise, as Benefit or Profit.

DE

Term. Sanct. Hill.

Anno Regis 18 & 19 Car. II.

IN

CANCELLARIA.

In Court. The Master of the Rolls.

Dr. Thorndike against Allington. Januar. 26.

A Devise was to the Plaintiff by the Defendant's father (whose Son and Heir the Defendant was) of 20l. per annum out of a Rectory, with a Clause of Distress for nonpayment.

The Glebe belonging to the Rectory was but of 40 s. per annum, and the Tythe not being subject at Law to a Distress, and so no sufficient Remedy at Law for the Rent, thereupon the Plaintiff brought his Bill to have the whole Rectory liable to the Rent, and the Defendant decreed to pay it. On the Defendant's part it was insisted, That this Court ought not to extend a Remedy beyond what the Devisor appointed, and the Plaintiff must take such Remedy as by Law he might. To which the Plaintiff's Counsel replied, That the Devisor gave the Annuity out of the whole Rectory, and intended the Tythe as well as the Glebe should be liable to it; And that in case of a Rent-secck, where the Grantee had no Seisin, this Court had frequently given Relief by Decree here. But the Defendant's Counsel insisted, That that was not like this Case, because in that Case there was no Remedy at Law at all.

Remedy in Equity for a Rent, where the Remedy at Law is not sufficient.

Moor 805. Pl. 1092.
Latib. 146.
4 Leon. 184.
Post. 147, 185.

Rent-secck without Seisin recoverable in Equity.

The

The person made liable to the Ar-rears of Rent, with which he was not chargable at Law.

The Court decreed, That the whole Rejoy be liable to pay the Annulity, and that the Defendant do pay the Ar-rears and Costs.

The Master of the Rolls.

Beversham against Springhold. February 11.

Injunction not to prove a Will in the Spiritual Court.

A Perpetual Injunction awarded against the Defendant not to prove a Will touching a Personal Estate on-ly in the Prerogative Court.

But note, That in this Case it was directed by this Court to be tried at Law, Whether a Will or no; and found against the Will; and then this Injunction was awarded.

The Lord Chancellor.

Gilpen against Smith Knight, and Dame Dorothy his Wife, and Zouch.

UPon a Re-hearing before the Lord Chancellor, Sir Edward Zouch seized in Fee of Lands, settled them on Trustees after his death for payment of his Debts, and dies, leaving the Defendant Zouch his Son and Heir, an Infant, and the Defendant Dame Dorothy his Widow: She entreteth upon the Lands, and taketh the Profits, (the Trustees not at all ading) then she marries Lloyd. After the Marriage, he continues to take Profits during his life, as she had before. He dies; then the Defendant Sir John Smith intermarries with Dame Dorothy, and he being in receipt of the Profits till that time, the Defendant Smith continued to receive the Rents until the Defendant Zouch came of age. The Plaintiff was a Creditor of Sir Edward Zouch, and his Bill was against the Heir of Sir John Smith and his Wife, and the Trustees to have his Debt paid.

This

This Cause being first heard at the Rolls, it was there decreed, That the Plaintiff's Debt should be paid, and that both the Lands and Smith (in respect of the Profits taken by Dame Dorothy and Lloyd and himself) should be liable to the payment thereof; with this, That if it fell on the Heir to pay the Debt, he should have the benefit of the Decree to reimburse him against Sir Smith, so far as the Profits taken by Dame Dorothy, Lloyd and Smith did extend.

From this Decree Sir Smith and his Wife appealed. And for Sir Smith it was insisted, That he ought not to be charged with the Profits taken by the Lady, or Lloyd her former Husband; and farther, That he had Assets of Lloyd's Estate, to whom he was Executrix.

Whether the 2^d Husband be answerable for Profits of land wrongfully taken by the Wife *dum sola*, & after by her former Husband during their Coverture.

The Argument on Sir Smith's part was thus: Either the Profits taken by the Lady and Lloyd were taken by Right (for there was a pretence she entred on the Lands as part of her Joynture) or by Wrong; If by Wrong, then Lloyd the Wrong-doer being dead, the Tort was dead with him, and so there was no Remedy to be answered for that Wrong; and compared this Case to a Trespasser, and the Trespasser dead. If by Right, then not answerable over for them.

Serjeant Maynard for the Heir insisted, That both by Law and Equity Sir Smith and the Lady were answerable for the Profits taken by the Lady, and after by Lloyd; as if Feme, Tenant pur vie, marry, and the Husband doth Waste and dies, Waste lies against the Wife. And compared it to the Case where a Feme Executrix takes a Husband that wastes the Testator's Estate, a Devastavit lies against the Feme after the Husband's Death for the Waste of the Husband. And the Feme, by her entring and meddling, had made her self liable to answer what she had took as a Debt; and Lloyd her Husband, upon his Marriage, continuing to take the Profits as he did, it's a Continuance of the Wrong he did, and by colour of her having entred before and taking the Profits, made her liable for her own Receipts, as a Debt owing by her. And her Marriage with

with Lloyd, which is her own Ad, cannot discharge her self; and the Husband must be looked upon as acting in this Case, by reason of the Wife's so acting before. And so, upon the whole Matter, the Court conceived the Decree just, and that Sir Smith must take his Wife chargeable with this Debt. But upon the proof that the Mother and the Son were related to the Earl of Anglesey, it was referred to him to moderate the matter if he could; if not, then directed a Case to be made.

DE
Termino Paschæ.

Anno Regis 19 Car. II.

IN
CANCELLARIA.

The Lord Chancellor:

The Master of the Rolls:

*Sir John Harrison against the Lord North, Executor of
 the Lady Mountague. April 25.*

The Plaintiff was Tenant to the Lady Mountague of a House in London, at a certain Rent: He left the House, and went to Oxon to the late King, and then sent his Servant with the Key of the House to the Lady, and desired her to re-enter and accept the Surrender. She said she would advise with the Defendant her Son-in-Law, (who then sat in the House of Commons, and asked with them;) afterwards she refused to accept of a Surrender. The House was made an Hospital by the Parliament for maimed Soldiers. The Defendant, as Executor to the Lady, brought Debt at Law against the Plaintiff for Rent incurred while the House was so used, and all the time. To be relieved against which Action was the scope of the Bill.

Finch p Quer. It is but reasonable, that if a Tenant be put out by such against whom he can have his Remedy over, that he notwithstanding be liable to pay his Rent to the Lessor: But here the Plaintiff hath no Remedy over; and it was an act of Force in the Parliament, which is pardoned by the Act of Oblivion, and so no Remedy over, and the King hath pardoned all his Arrears of Rent. The Law of England is *ex vi termini*, stricter in the matter of Rents than other Nations; for *redditus & reddere* is accepted as *restituere*, and *render* implies *apprendre*.

Whether Tenants held out by force by Soldiers in time of Rebellion shall for the time be relieved in Equity against payment of his Rent.

Aequitas sequitur Legem.

Carter and Cummins Case.

Maynard for the Defendant. The Plaintiff hath a pitiful Case, but not such as this Court can relieve; for the Law and Equity is all one in this Case; and if the Matter be no good Bar at Law, it is not good in Equity. And he insisted, That if Rebels the King's own Subjects do an act of Force, and hold a Tenant out, that is no Equity to excuse him from payment of his Rent; and cited the Case of Carter and Cummins about two years since in this Court, where the Plaintiff being a Tenant of a Wharf, which by an extraordinary Flood was carried all away, brought his Bill to be relieved against paying of his Rent; but all the Relief he had was only against the Penalty of the Bond, which was broken for nonpayment of the Rent; and the Defendant ordered only to bring Debt for his Rent. And he insisted, That a Surrender of Lands is no cause for oppositionment of Rent, which is stronger than the Principal Case. The Lord Chancellor took time to advise; but declared, if he could, he would relieve the Plaintiff.

Frank against Frank. May 17.

A Man seized in Tail of Freehold Lands, with Remainder to his Elder Brother, and of Copyhold Lands in Fee, devised his Lands to his younger Brother, and the Copyhold Lands to his elder Brother, and dies. The Devisers agree by Writing under their hands, that the Lands should be enjoyed by them respectively accordingly; and to draw on this Agreement, the younger Brother pretends the Devisor did suffer a Recovery of the Freehold

hold Lands, and produceth an Exemplification of a Recovery. Upon search, it was found there was a Writ of Entry brought, and a Warrant of Attorney to appear was entered; so that had the party that suffered the Recovery been living, he might have perfected the Recovery; but there is no Recovery of Record. The elder Brother being informed there was no Recovery upon Record, and so the Deviloz could not devise the Freehold Lands from him, and he being in truth entitled to the Copyhold as Heir at Law, and not by the Will, no Surrender being made to the use of it, brought his Action at Law to recover the Freehold Lands. The younger Brother exhibits his Bill upon the Agreement, and pretends there was a Recovery, howbeit the Record was imbezeled, and prays he may hold according to the Agreement between him and his Brother.

And upon hearing at the Rolls, it was decreed, That he should enjoy the Freehold Land, and an Injunction awarded to stay the elder Brother's Suit.

From this Decree the elder Brother appealed by Bill of Review, and upon hearing of the Bill of Review, it was insisted for the Plaintiff therein, That the Agreement between the two Brothers was parol only, and that the pretence of a Recovery was a fraud, there being none; and that if there was an intention, and it was never executed, that intention can never found a Decree against the Statute de Donis; and that the Agreement doth not alter the Case, it being introduced by fraud, there being in truth no Recovery, nor no Surrender of the Copyhold to the use of the Will. So that the Plaintiff in a Bill of Review ought to have both Freehold and Copyhold.

Maynard for the Decree. The Question is not, Whether the Recovery shall bar or not? but, Whether here is not enough to fortifie and execute the Agreement? He insisted farther, That the Plaintiff had departed from his Title to the Freehold Lands; and though the Agreement was not sealed, yet it was under hand, so that the certainty of it was not to be disputed; and so relied upon the Agreement, and that in that respect the Decree was well grounded, and thereupon the Bill of Review was dismissed with Costs; for *modus & conventio vincunt Legem*. So that in this Case the Agreement of the party, upon conceit he had not (when in truth he had) a Title to permit
an

Where an Agreement, tho' conceived upon mistake, shall bind the party.

Hard. 200, 204.
Poff. 219, 240.

another to enjoy Lands, shall for ever bind him; and yet this Agreement doth appear to be upon no valuable Consideration.

In Court. The Master of the Rolls, in the absence of the Chancellor.

Colwel against Sir William Child, a Master of this Court.

Rep. Chanc. Part 1.
195.

ALL parties to a Suit here consent to refer the whole matter to Serjeant Maynard, finally to be heard and determined; and Old Child, the now Defendant's Father, signified his consent by subscribing a Paper for that purpose, so as the Award was made by a certain day limited in this Paper. That elapsed, and then the Court in presence of all parties but Old Child, (who was then absent) by the assent of his Solicitor referred it back to Serjeant Maynard; but it was not inserted in the Order, that he should finally determine. Upon this, Serjeant Maynard made an Award, which was afterwards decreed, unless Cause shewn. Old Child shewed for Cause, that he did not consent; and his Solicitor made Oath he did not consent Serjeant Maynard should finally determine; yet the Award was decreed. Hereupon a Bill of Review was brought, and Error assigned; and upon the hearing of this Bill of Review, it was insisted, That the matter of Old Child's dissent was dehors, and not contained in the Decree. And it was said, The Court could not take notice of that, inasmuch as there did not appear any dissent in the Decree it self.

Errors in Law.
Error 1.

Solicitors assenting to Interlocutory may bind, but not to final Reference.

First Error assigned was, That the Assent of the Solicitor shall not bind the Party. Against which it was objected, That Solicitors are here as Attorneys at Law. And if an Attorney confess Judgment, the party is bound by it; and that usually Solicitors are looked upon here as Attorneys at Law; as for instance, In a Master's Report made in the presence of Solicitors. But it was answered and resolved by the Court, That although Solicitors assent to Interlocutories may bind, yet it cannot bind to a Reference

ference finally to determine. And it was said and admitted, That an Attorney's assent to an Award shall bind his Client. And this Error was declared by the Court to be good cause of Reversal. And it was declared it should not lie upon the Plaintiff to shew Old Child's dissent; for it appears upon the Decree, that it was the Solicitor's assent; and if the Decree want a sufficient foundation, it is Error, and the Plaintiff shall not be put to shew a Negative. And the Plaintiff's Counsel cited a Case between Brooks and Dickens, about 1652. where an Award was set aside for that the party did not actually assent to the Reference, and yet attended the Reference in the business.

Award set aside, for that the party did not actually assent unto the Reference.

For that the Award was but for parcel of the matter in Controversie, and not of the whole matter, whereof the Reference was to determine. And this Error allowed.

2 Error. Award erroneous, for that it's but of part of the matters referred.

For that the Decree was impossible; for by the Award (Decreed) Old Child was to pay a Sum of Money 24 Jan. 1654. or surrender an Estate; and the Decree was dated after the said 24 Jan. 1654. and so impossible. And this was allowed to be Error.

3 Error. Decree impossible.

For that the Award was repugnant; for it awarded Old Child to deliver up an Obligation of 800 l. in satisfaction of 400 l. of 1000 l. which he was to pay, and to vacate a Suit in satisfaction of 600 l. residue of the said 1000 l. although there was not any residue after the 400 l. and 600 l. satisfied. And this was ruled to be for Error also. And so the Decree was reversed.

4 Error. Decree repugnant.

Then it was moved, That the Solicitor who assented, and who was now Solicitor in this present Cause, should pay Costs to the Defendant Dr. Child: but resolved he should not; for that the assent he gave was in Court, and the Court knew such assent would not bind the party, and 'twas the folly of the other party to proceed on that assent.

The Master of the Rolls.

Smith against Smoult. January 21.

Whether the
Mortgage-money
belongs to the
Heir or Executor
of the Mortgagee.

The Question was, Whether the Mortgage Money should be paid to the Heir or Executor of the Mortgagee? And it was for the Heir insisted, That it was ruled in a Case between Tilley and Egerton in Michaelmas 1660. heard by the Lord Chancellor, assisted by the Lord Bridgman, there being no defect of Assets in the Executor's hands, that the Heir should have the Money, who is to convey the Estate. And this was said to be the first President of this kind. The Court will see Presidents.

And afterwards, about Michaelmas or Hillary-Term, 1667. the principal Case was heard before the Lord Keeper Bridgman, where the Order in the Case of Egerton was produced; but in the principal Case there appeared to be a Bond for payment of the Mortgage-Money, which goes to the Executors; And the Condition of the Redemption was upon payment of the Money to the Executors, &c. (without naming the Heir.) So it was ruled in the principal Case, That the Money should be paid to the Executor. But the Lord Keeper said, That if the Condition of the Redemption had been to pay the Money to the Heir or Executor, and no Bond were in the Case, nor no want of Assets of the Personal Estate, it might have been otherwise. And in the Case of Egerton, in reading the Order it did not appear how the Condition was penned; but the Court now took it that the Money was payable to the Heir by the Condition. Saint John against Grabham, 11 Car. 1. adjudged by the Lord Keeper, That the Heir, and not the Executor, should have the Money, being payable by the Condition to the Heirs or Assigns of the Mortgagee.

DE
Term. Sanct. Trin.
Anno Regis 19 Car. II.
IN
CANCELLARIA.

Elston Wallis and others, Executors of Anne Smith, against
Sir Thomas Crimes Baronet, John Scot Esq; and
others. June 4.

IN 1656. Sir George Crimes, Father of the Defendant
Sir Thomas, and whose eldest Son the Defendant Sir
Thomas was, demised the Lands in question to Anne
Smith for 2000 l. for 2000 years by way of Mortgage,
Sir George then being in Possession, and taken to be the
absolute Owner. 19 January, 1643. Sir Thomas Crimes,
Father of Sir George, had conveyed the Premises to the
Defendant Scot and others, and their Heirs, upon Trust,
that if Sir George, within six months after his Father's
death, secured to the Trustees 500 l. for the benefit of Sir
George's younger Children, then (after such Security first
given to the Trustees) to convey the Premises to Sir
George and his Heirs as he should appoint: And till the
time limited for giving the Security, the Trustees to stand
seized to the use of Sir George's eldest Son (which Sir
Thomas is) for his Maintenance; and in default of such
Security, the Trustees, at the request of Sir George's
eldest Son, to convey to him. This appearing to be the
Case in proof upon a Bill exhibited by the Plaintiffs to
inforce a Redemption, or to hold discharged of Equity,

R

the

the Court decreed that the Plaintiffs do hold and enjoy the Premises for Security of the 2000 l. with Interest, against the Defendants and all claiming under them, charged with the 500 l. to Sir George Crimes's younger Children from the time the Plaintiff came into Possession, and that the Defendants do accordingly execute Conveyances, unless the Defendant Sir Thomas Crimes do pay the Mortgage-Money and Interest by a day.

The Defendant brought a Bill of Review to reverse this Decree; and for Error shewed, That in default of giving Security in six months after Sir Thomas's death, the Trustees were to convey to the Defendant and his Heirs; and the Security was first to be given, before Sir George was to have any thing in the Lands; and that Sir George being dead, that was impossible, he having not given any Security.

1 *Abd.* 307.

A breach of a Condition precedent relieved in Equity as in the nature of a Penalty.

But upon debate of the matter, upon an Answer put in to the Bill of Review, and hearing of the Cause before the Lord Keeper Bridgman, 28 Octob. 1668. he declared he saw no cause to reverse the Decree, but looked upon the Condition precedent to be in the nature of a Penalty, and would regard the intent of the Trust, which was to secure 500 l. to the younger Children, which, with the way the Plaintiffs went in this Bill of Review, could not be. And so dismissed the Bill of Review.

D E

Term. Sanct. Mich.

Anno Regis 19 Car. II.

I N

CANCELLARIA.

The Lord Keeper.

Hide against Pettit. October 25.

There having been a Decree in this Case for a personal Duty, and a Sequestration awarded against the Defendant's Real and Personal Estate by the late Lord Chancellor, assisted by Baron Turner: It was now moved by the Defendant's Counsel against this Sequestration, and insisted, That this Court did not anciently grant any Sequestration but sparingly, and that only of the thing in demand; and that the Sequestration in this Case took more than all the Executions at Law; and that Sequestrations had been extended so far of late, as to sequester things in Action, which no Execution at Common-Law can reach, and the consequence of which would be destructive to Trade and Commerce. And besides, when any Purchaser is brought into this Court upon the Process of Sequestration upon Sequestration, that this Purchase is subsequent to the Sequestration, or for other reason bound thereby, whereas many persons so brought in are really Purchasers, or have other good Titles, which neither are

Argument *pro &*
contra Sequestra-
tion.

Sequestration a-
gainst Lands and
Goods.

The Power of the
Chancery.

nor ought to be bound thereby, those persons so brought in are looked upon as Contemners and Delinquents, and forced to answer Interrogatories blindfold, without having a Copy of them, or liberty to shew them to Counsel; by which means persons coming into this Court to defend their Interest, are often through their own unskillfulness concluded in their just Rights, even against Right, to the great Dishonour of the Court and of Justice. But to maintain the Sequestration, it was insisted by Fountain, That they were very ancient in this Court, and cited a Case, 17 Jac. Zacheverel against Zacheverel, where a Sequestration was awarded both against Lands and Goods, and the thing decreed was a Personal Duty; and this Sequestration was awarded by the Court, assisted with the Judges, upon view of four Presidents. Russel against Read: The Defendant being in the Fleet, the Money decreed was sequestered, it being in the Fleet; this in the Lord Coventry's time. And 18 Feb. 1662. assisted with Baron Turner in this principal Case, and the Case of Bedingfield and Zouch, That a Sequestration should be the usual Process of this Court, and the Course of the Court is the Law of the Land, and an Executor might bring an Action here before the Statute gave it. And it was urged, If you should take away Sequestration, the Justice of the Court would be elusory; And that after a Suit had been at great Charges in obtaining a Decree, if the Defendant would lie in Prison, there would be no Remedy for the Plaintiff to come by the fruit of his Decree; and the Remedy by Imprisonment would be ineffectual; for if he go abroad, no Escape lies. Upon a Judgment in a Court-Baron, a Levari Fac' goes, which takes all the Profits of the Lands, and a Statute before a Mayor takes all. And therefore not unreasonable that so great a Court as this should have an effectual means of bringing Suits to the fruit of their Suit, which without a Sequestration cannot be done.

And as to sequestering things in Action, there is no such thing sequestered in this Case. And as to the danger of bringing persons that came in for their Interest as Delinquents, by means of Sequestration, and their being deprived of Counsel to answer; that is the Case of every Decree and Contempt where there is no Sequestration, and is the course there as well as in the course of Sequestrations.

The

The Court will see Presidents; and after, at another time, declared, It was satisfied the Sequestration in the principal Case was well awarded, and that Sequestrations were a necessary Process of this Court.

Sequestration against Lands and Goods well awarded.

The Lord Keeper:

Sir Henry Henn against Sir Henry Conisby. October 25.

Money of the Defendants was lent out by one Yarway to the Plaintiff, upon the Security of a Mortgage and Recognizance, and the Security was taken in one Campbell's Name in Trust for the Defendant. The Money was lent 1659. and paid in to Yarway in 1663. and all Interest for the same, and Yarway during that time and a year after paid the Interest to the Defendant, but the Defendant himself kept the Security. Yarway failed, and the Question was, Whether the payment of the Money to Yarway (who had not paid it over to the Defendant) should be taken as a good Payment to conclude the Defendant?

For the Plaintiff, it was laid down by his Council as a Rule, That where one places Money in a Scrivener's hands with this general Trust, for him to put it out where he pleaseth, there by that general Trust or Authority the payment back to the Scrivener is good payment.

And it was proved by Witnesses, that the Defendant had said, He had trusted Yarway with the greatest part of his Estate, and he feared he should be cozened; which the Plaintiff's Council insisted on as Evidence to prove that the Defendant trusted Yarway with his Money: But as to that, it was answered by the Defendant's Council, That Conisby lent Yarway other Moneys on his own Security, which he lost, so might say he was like to be cozened by the said Yarway. But it was farther insisted by the Defendant's Council, That the Defendant kept the Security himself, which clearly shewed that Yarway did not act under such general Authority as was alledged by the Plaintiff's Council. And it was insisted, That that one Circumstance would rule the Case; and no man will pay the Money due upon a Mortgage and Recognizance (no not

Whether Money paid by the Borrower to the Scrivener that is imploy'd in lending of the Money, without taking up the Security, be a good payment to conclude the Lenders.

on

on a Bond) without having the Security up, and the payment of the Money by the Plaintiff to the Scrivener without having up his Security, was an Evidence that he did trust the Scrivener more than the Defendant did, (who always kept the Security himself) and he that trusted most is to be cozened.

A Case between Sir Gilbert Gerrard and Baker was cited by the Defendant's Counsel, where Money was paid to one that did usually receive for the Obligee, yet the Obligee not trusting the Receiver with the Bond, it was held no good payment.

The Court conceives the Case is against the Plaintiff, in regard the Defendant kept the Security, but will see Presidents; English against Lee, a President cited by the Plaintiff in 1655. And after the Court had perused the Presidents on both sides, Pasch. 1668. Judgment was given for the Defendant, That the payment to the Scrivener should not conclude him: but he was ordered to take the Principal without Costs.

D E

Term. Sanct. Hill.

Anno Regis 19 Car. II.

I N

CANCELLARIA.

The Lord Keeper.

Mary Thomas *Widow*, against Edward Porter, Phineas Porter, and Robert *Bishop* of Worcester. Febr. 8.

The Plaintiff was Tenant durante Viduitate of the Lands in question, being Copyholds of a Manor whereof the Defendant the Bishop was Lord, Remainder to Edward Porter. The Plaintiff had felled Trees, which at a Court-Baron was presented, and found a Waste, and consequently a Forfeiture by the Homage; and the Defendant Edward was afterwards at another Court, after an Entry made by the Bishop for Forfeiture, admitted, and brought Ejectment, and before a Judge of Assize had a Verdict.

To be relieved against which was the Bill, which did suggest, That the Timber that was cut was worth but 40s. and the Estate 60l. per annum, and that there was 300l. worth of Timber standing; and that if upon Examination it should appear to be Waste, the Plaintiff would make satisfaction.

The Defendant Porter by Answer insisted, That the Waste was voluntary, and declared to be so by the Judge
of

of Assize before whom the Judgment was; and that the Timber felled was worth 60 l. Upon the Proofs there was a great difference touching the value of the Timber felled, and some proof of a Load or two of Boards that were carried off the Premises by the Plaintiff, which for her was insisted were carried to another Copyhold within the same Manor; but there was not any proof that the Plaintiff had sold any of the Timber she felled; and it was proved the Copyhold in question was much out of repair, and for the Plaintiff insisted, that with that Timber she intended to repair the same.

The Lord Keeper. It was not clear there was any wilful Forfeiture, for that the Defendants before the Plaintiffs had applied the Timber, took advantage of the Forfeiture, and the Defendants were ever forward therein; and yet withal declared, That in case of a wilful Forfeiture he would not relieve; and then referred the Cause to the Bishop, the Defendant, to be Chancellor in this Cause.

Upon this, the Bishop certified the Waste to be wilful, and no ground to relieve the Plaintiff.

Upon this Certificate, the Cause coming to be heard before Justice Tyrrel (in absence of the Keeper) he pronounced an Order to dismiss the Bill; which being stayed by a Petition to the Lord Keeper, 11 Novemb. 1668. he re-heard the Cause; at which time it was insisted for the Plaintiff, That the Lord Keeper could not delegate his Jurisdiction to the Bishop, as the Order on the first hearing did mention; which was admitted; and it was made out by Affidavits, That the Bishop's Son had taken a Bond from the Defendant Porter for 50 l. if the Cause went for the Defendant Porter.

A Forfeiture of a Copyhold by felling of Timber relieved in Equity.

Upon this hearing, it was referred to a Trial at Law upon this Issue, Whether the primary intention in felling the Timber was to do Waste? But as the Order was drawn up, the Issue to be tried was, Whether the supposed Waste was wilful or not?

And upon two several Trials it was found for the Plaintiff; and so after these two Trials, it was decreed, The Plaintiff should be relieved, and the Defendant to deliver Possession, and account for the mesne Profits.

In Court. The Master of the Rolls.

Saint John Esq; against Holford Baronet, and others.
February 9.

The Defendants Grandfather (whose Heir and Executor the Defendant is) became bound with the Plaintiff's Father (whose Heir the Plaintiff is) in several Bonds, as his Surety for 4000 l. The Plaintiff's Father conveyed the Manor of Colwerton by way of Mortgage to the Defendants Grandfather, to counter-secure him against the said Bonds for 4000 l. The Plaintiff's Father prevailed with the Defendants Father to become bound with him afterwards for 2000 l. more. Then the Plaintiff's Father paid off 1500 l. of the 4000 l. Debts by Bond.

The Bill was, to be admitted to redeem upon payment of what the Defendants Grandfather or himself had paid off or been dampnified by the Bonds for the 4000 l. and what remained unpaid of the 4000 l. And the Question was, Whether the Plaintiff (inasmuch as there was no Agreement proved that the Mortgage was to be a Security to the Defendants Grandfather against the Bonds for the 2000 l. as well as those for 4000 l.) should be admitted to redeem upon payment of the 4000 l. without the 2000 l. And it was ruled, and so decreed, That if the Plaintiff would redeem, he should reimburse and save harmless the Defendant as well touching the 2000 l. as the 4000 l. upon this Rule, He that will have Equity to help where the Law cannot, shall do Equity to the same Party against whom he seeks to be relieved in Equity.

Counter-Security given against one Debt shall extend to be Security against another Debt.

He that will have Equity must do Equity.

Serjeant Maynard and Fountain were of Counsel in this Case with the Plaintiff, and did without any debate rest in this Order. Serjeant Fountain said, It was a just Decree.

Hill. 1667. Upon an Appeal to the Lord Keeper Bridgman, the Decree was confirmed.

Gore against Blake.

Rep. Chant. 263.

The Case being stated by Order, came this day to be determined; and in effect it was thus: A. by his Will, whereof he makes B. his Executor, deviseth (inter alia) that B. shall take the Rents and Profits of his Lands of Inheritance for fifteen years, in Trust to pay his Debts, and upon other Trusts; and after several particular Legacies, bequeaths all the residue of his Goods and Chattels to B. his Executor. It falls out that all the Debts are paid, and all the Trusts performed, and there is an Overplus of the fifteen years besides what was sufficient to pay the same.

Whether the overplus of the Profits of a term devised out of an Inheritance, in Trust to pay Debts, to the Executor, who is residuary Legatee, doth belong to the Heir or Executor.

The Question was between the Heir and the Executor of B. Who shall have the Remainder of the fifteen years after the Debts paid, and Trusts performed? For the Heir it was said, there was a difference between this Term, being out of the Inheritance, and a bare Chattel; and that the Overplus of this Term being out of the Inheritance, should attend it; and there was not any intention in the Testator to give the Executor the Profits for fifteen years, otherwise than to make provision for payment of his Debts, and those other Trusts; and that the end being satisfied, the residue of the Term did cease, and return to the Inheritance. But for the Executor it was insisted, That the fifteen years was a Term, and then the Devise of the residue of the Goods and Chattels did pass.

Curia. The Term is in the Devisee, and there passed an Interest; and if it had been devised, the Executor should take the Profits for fifteen years; and then the appointing the Debts to be out of the Profits, and the other Trusts doth not alter it, so conceives the residue of the Term belongs to the Executor, and not to the Heir; and so decreed. Tamen quære.

Sir

Sir Joseph Douglass, and his Wife, against
William Waad.

JAMES WAAD, the Defendant's Father, having married a first Wife, did in her life-time, many years before her death, by several Fines and Deeds settle the several Manors of Burtles and Payton-Hall, to the use of himself for life, Remainder to his first and all his other Sons in Tail. Afterwards the first Wife dies without Issue; then James Waad marries with the Daughter of Elkonhead: but before Marriage agrees with Elkonhead, that in consideration of 1000l. Portion, which Elkonhead was to pay her, to settle her a Joynture of 300l. per annum, (of which it appeared in the Case Burtles Manor was to be part) but what the other Lands were that were to make up the 300l. per annum, did not appear. James Waad hath Issue by his second Wife the Defendant, and died, leaving the second Wife, who married Douglass the Plaintiff.

Their Bill is against the Defendant, to have him decreed to settle the Joynture on the Defendant's Mother, and to set aside the Settlement made by James Waad against the Joyntress as fraudulent.

When this Case was first brought to hearing, there was no proof of payment of the 1000l. Portion by Elkonhead; but it proved that Elkonhead maintained James Waad, and furnished him with Money for other Uses.

And it was insisted on the Plaintiff's part, that Marriage was a good consideration to make the Joyntress a Purchaser; and it was her Father that was to pay the 1000l. and not she, and so she was clearly a Purchaser. If a man secure his Purchase-Money, it's payment. And to this Opinion that she was a Purchaser, the Lord Chancellor inclined. And the Plaintiffs Counsel, Serjeant Maynard and Fountain, insisted, That the Joyntress being a Purchaser, the Settlement being after the Marriage of the first Wife, was fraudulent as to the Joynture, which the second Wife claims by the Marriage Agreement.

On the Defendant's part it was insisted, The first Conveyance was good, and cannot be set aside by the Marriage Agreement: For it was not in the power of the Father

Marriage a good consideration to make a Feme a Purchaser. Security of Purchase-Money is payment.

Every voluntary
Conveyance is
not fraudulent.

But *prima facie*
it's presumed to be
fraudulent.

A voluntary Con-
veyance prece-
dent, as to a Mar-
riage-agreement
subsequent, is
fraudulent.

ther after the first Settlement to avoid it, and every volun-
tary Conveyance is not fraudulent. The Chancellor of Ox-
ford's Case, Merry and Littleton's Case, 10 Jac. Fraud is
not to be presumed. And this Conveyance was by fine, and
so notorious and upon Record; and there could not be any
intention of Fraud as against the second Wife; and it's rare
that this Court takes upon them to judge a Deed frau-
dulent.

To which it was replied, Fraud is only cognizable here,
and was only proper here before the Statutes; and every
voluntary Conveyance is presumed to be fraudulent, unless
he that claims by it can prove the contrary.

The Lord Chancellor inclined, the Joyntress is a Purcha-
ser; and whether the Deed be fraudulent, proposes to have
it tried; but after referred it to a Case. And a Case being
stated to the effect as supra, with this more, That there was
a Release given by James Waad for the Portion 25 Febr.
19 Car. 2. the Cause came to be heard before the Lord Chan-
cello; and Baron Turner.

At which time the Court declared the Marriage was a
good consideration to make the Feme a Purchaser; and be-
sides, upon the Release for the Portion, it was clear she was
a good Purchaser, and that all voluntary Conveyances are
prima facie to be look'd upon as fraudulent against Purcha-
sers, unless the contrary be made appear; and so decreed the
Settlement by James Waad to be set aside as fraudulent.

The Defendant brought a Bill of Review, and assigned for
Error, That it was not cognizable here whether a Deed were
fraudulent, but that was only triable at Law; and besides, no
colour of Fraud against the Joyntress; for the Deed, as appears
by the Decree, was made in the life of the first Wife, who lived
ten years after, and the second Wife not then thought on. And
the Settlement being by Deed and Fine, ought not to be presu-
med fraudulent without proof. And it was farther assigned
for Error, That by the Decree the Settlement as to Payton-
Hall was to be part of the Joynture; and she was not, as ap-
peared, any Purchaser as to that; and so no reason to set aside
the Settlement as to Payton-Hall, under the Notion of the
Joyntress being a Purchaser, for that it did not appear that
that was within her pretended Purchase.

To

To this Bill of Review the Defendants demurred, and insisted that the Decree was well grounded; and upon debate thereof before the Lord Chancellor and Baron Turner in Trinity-Vacation, 19 Car. 2. the Demurrer, as to the points above, was allowed.

But as to another particular touching the mesne Profits (which Point I have not stated) the Plaintiff in the Bill of Review was, upon arguing of the Decree, relieved, and the Decree so far explained (that is to say) Whereas by the Decree the Defendant was to answer, and pay all the Arrears of the 300 l. per annum to the Joyntress since his Father's death, whereas it appears by the Decree, that by a former Decree of the Court the mesne Profits had been applied first to the payment of Eltonhead's Debts, and afterwards been taken by the Lady Waad; and the Defendant was neither charged as Heir or Executor to his Father, nor had any Assets to answer the Arrears.

It was ordered, That the Defendant should be chargeable only with so much Arrears as he had received out of the Lands.

D E

Termino Paschæ.

Anno Regis 20 Car. II.

I N

CANCELLARIA.

The Lord Keeper.

The Master of the Rolls.

Pearson against Pulley. 25 April.

Special directions
touching old
Mortgages.

The Bill being to redeem a Mortgage made in 1632. and it being insisted on by the Defendant, That he came in as an Assignee at the third hand, and so it would be hard to put him to an Account now; the Lord Keeper said, That in regard there had been no stint put to the time a Mortgage is to be redeemed, the Defendant shall come to an Account; but in regard he comes in at an old hand, shall not account but so far only as goes in discount of his Money, but not for the Surplusage. And he said he would have a Rule to limit to what time a Mortgage shall be redeemable, and conceived twenty years to be a fit time, in imitation of the Statute of Limitation of real Actions: But gave no Rule in that, but only he directed that when a Bill came to redeem an old Mortgage, the Defendant should plead or demur to it, that so the Judgment of the Court might be had upon it.

The

*The Lord Keeper.**The Master of the Rolls.*

David Jenkins Esq; *against* Sir Charles Kemis Baronet,
and others. April 28.

EDward Kemis Esq; deviseth the Lands in question after other Estates Tail (which are all spent) to Sir Nicholas Kemis for life, Remainder to his first Son, and the Heirs Males of his Body, with other Remainders over; Sir Nicholas hath Issue Charles, Father of the Defendant Charles. In 1637. the Defendant's Father married Blanch the Daughter of Mansel, with whom he had 2500 l. which Sir Nicholas had, and thereupon Sir Nicholas and Charles his Son levied a Fine, and suffered a Recovery, and five years after, viz. 1 April, 18 Car. 1. by Indenture Tripartite, whereto Sir Nicholas and Charles his Son are both parties named; and tho' Charles never sealed, yet he consented to the Use thereof, reciting that Nicholas was Tenant for life, the Remainder to his Son Charles prout, and the Marriage of Charles prout, and that his Wife's Portion was 2500 l. and that Sir Nicholas had it, and the Fine and Recovery had thereupon, and in consideration thereof, the Uses of the Fine and Recovery are declared to be to Sir Nicholas for life, the Remainder to his Son Charles, and the Heirs-males of his Body, begotten on the Body of Blanch, the Remainder to the Heirs-males of Sir Nicholas, the Remainder to the Heirs-males of the Body of Sir Charles the Defendant's Father, the Remainder to the right Heirs of Sir Nicholas, with a Power to Sir Nicholas by Deed or Will to charge the Land with 2000 l. as he should think fit. After in January, 18 Car. 2. the Marquis of Worcester borrowed of the Plaintiff's Father 2000 l. which was applied to the King's Service, and prevails with Sir Nicholas Kemis, and Charles his Son, then both under his Command, by Lease and Release to convey the Premises to the Plaintiff's Father in fee, by way of Mortgage, wherein they covenant to make farther Assurance. The Mortgageors continue Possession, and die. The Defendant is eldest Son and Heir of the said Charles Kemis by a second Wife, Blanch being dead without Issue, but claims the

Whether a legal defect in execution of a Power may be supplied in Equity.

4 *Lam.* 8.

2 *Vent.* 350.

1 *Levinz.* 238.

2 *Chanc. Cases*, 30.
Post. 241.

Whether if a man that hath power only to charge Lands, conveys them for so much as he hath power to charge them, shall Equity enforce him to execute his Power to the same person?

the Premises as Issue in Tail by the Settlement as Son and Heir of his Father. The Mortgagee brought Ejectment against the Defendant, and thereupon a Special Verdict, ut supra, and upon Argument ruled against the Plaintiff; whereupon the Plaintiff, being as well Executor as Heir to his Father, brings his Bill in Equity, suggesting the Tripartite Deed antedated, and however to be merely voluntary and fraudulent as to the Defendant, he not being the Issue of Blanca, and so not within the consideration of the Tripartite Deed and Settlement, and the Plaintiff being a Purchaser, and the Defendant's Father or Grandfather being taken by the Plaintiff's Father to be seized in fee when they made the Mortgage. And it was farther insisted on by the Bill, That Sir Nicholas having a Power to charge the Premises with the payment of 2000 l. and the Mortgage being for 2000 l. tho' it were by way of Conveyance of the Lands, and not by a charge of the Lands, and so according to strictness of Law not good: yet in Equity it ought to be taken as in Execution of the Power, and that nice legal defect ought therefore to be supplied in Equity to the Plaintiff, who is in under a Purchaser.

For the Plaintiff it was farther insisted, That Sir Nicholas's Power ought to be knit to his Interest, and so come in supply of his Interest to make the Mortgage good. And if a person that hath Power to charge Lands for a Sum of Money, do for the like Sum convey Lands to another, and covenant to make farther Assurance (as here,) Equity will compel him to execute his Power to the benefit of the person from whom he hath received the Money. And the Defendant was Heir to Sir Nicholas and his Father, and bound by their Covenant to farther Assurance.

Whereunto it was answered by the Defendant's Counsel, That the Defendant does not claim as Heir to his Father or Grandfather, but by the Settlement; and that he was Heir-male of the Body of his Father, and was within the consideration of the 2500 l. Portion which the Grandfather had, and which belong'd to the Father; and however, if that Settlement had not been made, the Defendant was Issue in Tail by the Settlement made by Edward Kemis's Will. And it was farther insisted, That the Settlement by which Sir Nicholas had power to charge the Lands was discharg'd by the Mortgage, he having conveyed all his Interest out of him thereby, and that so he was disabl'd to execute his power after. And it was also insisted for the Defendant, That Equity in

in this Case ought to follow the Law. the Defendant claiming by precedent Title to the Plaintiff in such manner, that there was no Equity to bind it farther than by Law it is bound; and in truth it did appear (howbeit it was not found in the Special Verdict) that Sir Nicholas did, after the Mortgage to the Plaintiff's Father, in pursuance of his Power, charge the Premises with 2000l. Debt which he owed, which Debts the Defendant's Father paid accordingly.

The Lord Keeper conceived the Power was not destroyed by the Mortgage, because it was by Lease and Release, and not by Fine or Feoffment. Yet both he and the Master of the Rolls were of Opinion that the Plaintiff could not be relieved in Equity. Nevertheless, at the Plaintiff's importunity, he directed a Case to be made, and after Michaelmas Term, 1668. he dismiss'd the Bill.

Where a Power to charge Lands shall be destroy'd by the Conveyance of him that hath the Power, and where not.

J. Gill C.P.
303.

The Lord Keeper.

Justice Tirrel.

Justice Rainsford.

Haynes and others, Executors of Smithby, against Harrison and others, Farmers of the Customs. May 19.

On a Demurrer to a Bill of Review.

The Bill was a Bill of Review to reverse a Decree made by the Lord Chancellor Hyde, for that by that Decree all Interest due on several Securities by Bond and Indgments, and Costs at Law, suffered before the first Bill in suing those Securities, were taken away, upon a pretence that the Money lent the Defendants by the Plaintiffs Testator was paid by them to the King in consideration of the Farm of the Customs, which they did not enjoy: whereas their Testator was not concerned in the bargain; and if disposing Money by the Borrower, and any Accident befalling it afterwards, should create an Equity against the Creditor, it would destroy all Commerce. And by the Course of the Court, which is the Law of the Court,

Errors assigned.

P

where

Where Interest is due on a Bond, & the Debtor pay any Sum less than the Interest, the payment is accounted Interest only.

where Interest is due on a Bond, and the Debtor pay any Sum less than the Interest, the payment is to be accounted Interest only, yet the Decree allows such payments (altho' they were much less than the Interest then due) for Principal. And the Court hath also taken away the Plaintiffs Costs at Law, tho' by the Decree 800 l. is still due to the Plaintiffs on legal Securities, and the Proceedings and Costs at Law were before any considerable part of the Principal was paid, taking the Interest for the Principal, as the Decree doth; so that the Proceedings were legal, and without those the Plaintiffs Testator could not recover his Debt, and so ought to be allowed those Costs.

Interest upon a Debt due by Specialty, and Costs at Law, may upon Circumstances be taken away in Equity.

The Defendants demurred, and insisted, That there is no Error in the Body of the Decree, nor new Matter to reverse it, and insist that this Court ever had a Power upon Circumstances to relieve against Penalties, Judgments and Executions, and to abate and moderate, and sometimes discharge Damages and Costs; and it was insisted it had exercised such Power in the Lord Keeper Coventry's time. And the Court did declare this Court had a Power upon Circumstances to abate and moderate Costs and Interest, and sometimes to discharge them; and they must take the Decree as they found it, whereby it appears Smithby's Debt was ill made up, and that the Farmers became bound in consideration of the Farm, which they did not enjoy, and Costs are in the discretion of the Court; and Costs discharged there, because there was no Oppression. And so the whole Court declared they could not go out of the Decree, and saw no cause to reverse it, and so dismissed the Bill.

The Court did declare this Court had a Power upon Circumstances to abate and moderate Costs and Interest, and sometimes to discharge them; and they must take the Decree as they found it, whereby it appears Smithby's Debt was ill made up, and that the Farmers became bound in consideration of the Farm, which they did not enjoy, and Costs are in the discretion of the Court; and Costs discharged there, because there was no Oppression. And so the whole Court declared they could not go out of the Decree, and saw no cause to reverse it, and so dismissed the Bill.

be
Je
D
16
m
w
D
ab
vic
be
th

D E

Term. Sanct. Trin.

Anno Regis 20 Car. II.

I N

CANCELLARIA.

*The Lord Keeper.**Chief Baron Hale.*Cuthbert Morley Esq; against Jerome and Henry
Elways. June 1.

The End of the Plaintiffs Suit is to have the Redemption of a Mortgage, made by the Plaintiff and his Father, James Morley Esquire, in December, 1641. to Jerome Elways, Father of the Defendants Jerome and Henry. Against the Plaintiff's Relief, the Defendant set up a Release made by the Plaintiff in 1646. of all his Equity of Redemption, and a Decree made by the Lord Chancellor Hyde in this Cause in 1662, which Decree is penned as if made by consent. This Decree being signed and inrolled, and the Plaintiff not able to perform the same, could not have a Bill of Review; nor could he be relieved by such Bill, if it had been brought, the Release barring all his Pretences, and that being upon a secret Trust, he could not prove the

Release of Equity
of Redemption.

Trust positively, the Witnesses being dead, and so he was not relievable neither in Law nor Equity. Whereupon the Plaintiff and Baron Greenvil Esq; petitioned the Lords House the last Sessions of Parliament for Relief against the said Decree and Release. The Cause held many Debates at the Bar of the Lords House before Christmas, 1667. the great Question being, Whether the Release was made in Trust, or bona fide for a valuable consideration? The Proofs offered to evidence the Trust were circumstantial, and not direct positive Proofs. One thing offered by the Plaintiffs to evince the truth of their assertion to their Lordships in affirming the same to be only a Trust, was, That their Lordships would please to consider what Debts were due from the Plaintiff or his Father to the Defendant when the Release was made, and with that to take notice of the value of the Estate released at the time of the making thereof. As to the reading the Proofs to both these, the Parliament being to adjourn in two days, and there not being time, their Lordships adjourned the consideration of these two things, and reading the Proofs to the value of the Estate, desisted until their next meeting after Christmas.

The Lord Keeper present thus far.

But the next meeting after Christmas, the Lord Keeper being absent, the Lord Privy Seal sat on the Wool-pack, and the Cause had two days hearing when all the Plaintiffs and Defendants Proofs were read to the values; and the House, after several days debate of the Matter, being satisfied that by the Proofs it clearly appeared that the value of the Lands was much greater than to make a satisfaction for the Debt for which it was released, did adjudge the said Release to be a farther Trust to pay 80l. per annum to the Comptroller for Life, and set aside the Decree aforesaid, and referred the Cause back to the Court, to proceed as in the Case of an equitable Mortgage, which their Lordships adjudged this to be.

Luna, primo Junij, 1668. This Cause was heard in Court, when a Decree was made for the Defendants to come to an Account, and the Plaintiff to be admitted to the Redemption of his Estate. The ordering part is as followeth:

First,

First, That Jerome Elways come to an Account for all the Profits of the Lands in question, which he or his Father, or any other to his or their use, or by their direction or appointment, have, or might without their own wilful default have received. That Sir William Glascock should take the Account; but with this direction, that in case the Lands mortgaged in Fee were not a sufficient Security for the Money due to the Defendant's Father, and for which he now stands engaged for them, and the pre-engagement that was thereupon at the time of the Defendant's Father's taking the Sequestration over, and besides the other Lands mortgaged, in which at the time of the Defendant's Entry, and the Release made, the Plaintiff had only one Estate for Life, that then the Defendant shall be charged in the Account no more for the Lands held for the Plaintiff's Life, than the Master shall really judge them to be worth, without respect to the benefit that hath happened by the continuance of the Plaintiff's Life.

A Mortgage for an Estate for life on an old Mortgage shall not account for more than the Estate had been worth to be sold.

The Plaintiff grieved with this direction, procured a Re-hearing by the Lord Keeper, assisted with the Lord Chief Justice Vaughan, and Chief Baron Hales, and they confirmed this Order, and that in respect of the Contingency of the Estate, and not for what was made, the Mortgage being above twenty years old.

For the Plaintiff it was insisted, That this was a new direction without a President; and that it was safer to judge what was, than what might have been; and that at this rate the Western Estates would not be mortgageable.

The Plaintiff by Petition complained of this direction to the Lords in Parliament, and upon a solemn Hearing at the Bar of the House he was relieved, and the Lord Keeper ordered to direct the Mortgagee to account for the whole Profits of the Estate for Life, as in the Case of other Mortgagees.

Yet upon Appeal in Parliament ordered otherwise.

Baron

Baron Turner.

Delamere against Smith the Executor of Smith.

The Plaintiff having had great Dealings with Smith the Testator, for Vault and other things bought by the Plaintiff, by that means he became indebted to the Defendant's Testator in several great Sums, for which he gave him Security by Mortgage, Bond and otherwise.

Afterwards the Plaintiff became a great Loser by the badness of the Vault he bought of the Defendant's Testator, and other Accidents, and thereupon Smith and he came to a new Agreement, That in consideration of 80 l. lately before paid, and of 70 l. paid on the Plaintiff's behalf by one Tubbing the Plaintiff's Father-in-law, and of 40 l. more promised by Tubbing at a short day, That if the 40 l. were paid accordingly, that then if the Plaintiff should pay Smith 800 l. in four years by 200 l. per annum, that the said Smith would deliver up the Plaintiff all his Securities, &c.

The Money was all paid to Smith the Testator but 104 l. tho' not at a precise day: So to have those Securities up upon paying what was unpaid upon the last Agreement, with Damages from the time it should have been paid, is the scope of the Bill.

In this Case it was insisted for the Defendant, That where a greater Sum is due by Specialty, and a less agreed to be taken for it, to be paid in certain Sums at certain days, if the Agreement be not strictly pursued, and the Moneys paid precisely at those days, but part of the Money paid at other days, a Court of Equity ought not to oblige him that made that Agreement (in favour of the person failing to perform it) to stand to it upon payment of so much as will make up the Money paid since the last Agreement, with Damages for the same, from the respective times the same should have been paid by that Agreement, to the times the same were paid, and Damages for what remains unpaid, till the same be paid. But if the Plaintiff would have any benefit by the Agreement, he ought literally to have per-

Whether when a lesser Sum is agreed to be accepted at precise days in lieu of a greater, if he that is to pay, fails in payment at those days, he shall not have any benefit by that Agreement.

Term. Trin. 20 Car. II. in Canc'.

performed it, which was in his favour, and without any Penalty; and therefore insisted that the Plaintiff was not to have any benefit by that Agreement. Ant. 92. Post. 301.
a Chanc. Case 1.

The Baron ordered this matter to be made into a Case; but as yet nothing done therein. And it is to be observed in this Case, that part of the Consideration of the Agreement was, That Tubbing (who was not obliged by any former Security) had paid Smith 70l. and undertook to pay him 40l. more; so Smith bettered his Security, &c.

Degg against Osbaston.

The like Case with that of Hen and Conisby, ant. f. 93. Money paid in by and upon solemn Debate ruled as that was. And in the Borrower to both these Cases the Mortgagee was ordered to take his the Scrivener, no Principal without his Interest; and time was given for payment of the Principal, (viz.) a years time: good payment to conclude the Lender.

DE
Term. Sanct. Mich.

Anno Regis 20 Car. II.

IN

CANCELLARIA.

The Lord Keeper.

Sir Geoffry Palmer, the King's Attorney-General, on the behalf of Jerome Smith, a Lunatick, against Sir Robert Parkhurst and others. Octob. 26.

The Bill did suggest, That by Inquisition taken before the Mayor of London, by virtue of a Writ to him directed, the said Jerome Smith was the 23d of June, 1664. found a Lunatick, and had lucid intervals, and had not sufficient government of himself, his Lands and Goods; and that he was Lunatick the last of June, 1647. and during his Lunacy he had several Sums of Money due to him, which he had wasted, and alienated divers Goods, but to whom the Jurors were ignorant. And did charge, That one Archibald owed the Lunatick during his Lunacy 1300 l. by good Security; and that in 1656. the Defendant caused the Lunatick to assign Archibald's Debt to him, and had received the same upon colour of a Satisfaction given to the Lunatick for the same, whereas that pretended Satisfaction was not valuable, and was done in prejudice of the Lunatick. And to have an Account

count of the 1300l. and to be relieved was the scope of the Bill.

The Defendant sets forth by Answer, That he sold the said Jerome Smith in 1656. a Manor, which he much desired to buy at 1200l. it being the place of his Birth; Jerome Smith assigned Archibald's Debt for to satisfy himself the Purchase-Money, and pay the Overplus to Smith, which he did, and did convey the said Manor to Smith, and insisted that Smith was not a Lunatick at that time, but did usually buy and sell, &c.

This being the nature of the Case, it came first to be heard before Justice Ticerel, who although it did appear that the Defendant had conveyed the said Manor to Smith for the said 1200l. and that Smith did at that time usually barter, and was not found a Lunatick till eight years after, with a retrospect of seventeen years, did order the Defendant to account for the 1300l. being Archibald's Debt, and to satisfy the same with Damages, without any provision for the Defendant's having the Manor again, or account for the mesne Profits. And though it was stood upon at the hearing, That in case of a Lunatick (where the King hath no Interest in his Estate, but as Pater Patriæ commits him to another to manage it for him, the Lunatick, in case he recover his Senses and Wits, shall have his Estate again; and if not, it will go to his Administrators) the Lunatick himself (as in the Case of an Infant) ought to have been a Party: yet that Opinion was over-ruled by the Judges, and by the Lord Keeper on a re-hearing. But the Lord Keeper did stay the passing the Decree, and gave liberty to the Defendant to traverse the Inquisition.

A Bargain by a Lunatick 8 years before the Lunacy found, avoided by being found a Lunatick, with a retrospect of seventeen years.

Yet the party admitted to traverse the Inquisition.

Note, That generally a Lunatick ought to be made a party: but the reason why it was over-ruled here, was, that he might stultify himself.

The Lord Keeper.

Carter and others, Creditors of Church, against Church, alias Westin, and others. Octob. 28.

CHURCH deviseth some part of his Lands and Tenements to his Executors to sell for payment of his Debts, and the rest of his Lands he devised to marry his Daughter, in Fee, being then a year old, and declares that his Executors shall receive the Profits of those Lands

Q

until

Devise of Profits till a Child come to 21 years, is a good Devise of a term till the Child would be 21, tho' he die before.

until his Daughter come to the age of one and twenty years, towards payment of his Debts and Legacies. The Daughter died at five years old. The Lord Keeper was of Opinion, that the charging the Profits till the Daughter attained one and twenty (tho' she died before) amounted to a Term till she would have attained that age, if she had lived; and cited Boraston's Case, 3 Co. and a Case in Dyer, where Lands were given to a Mother for Education and Maintenance of the Daughter till eighteen years old; the Daughter died before eighteen, yet adjudged a good Term to the Mother till she would have attained eighteen had she lived. And he said that the principal Case was much a stronger Case.

*The Lord Keeper.
Justice Windham.*

Jacob Ash *against* Gallen. November 18.

It was declared, That a Use upon a Use will not rise by Bargain and Sale, Dyer 155. and Chudley's Case, Co. Rep.

But for the Plaintiff it was insisted, That tho' a Use could not rise as a Use upon a Use, yet as a Trust it would in Equity. And a Case was ordered to be made, which was this:

Isaac Ash with his own Money bought Lands of 100 l. per annum, and took the Conveyance by Indenture in these words; Grant, Bargain, Sell, Alien, Enfeoff, and Confirm to Isaac Ash, his Executors and Assigns; To the Use of Isaac for Life; Remainder as to one Third to his Wife for Life; Remainder to Jacob Ash and to his Heirs, (whose Heir the Plaintiff is) with a Letter of Attorney to make Livery. The Deed is acknowledged, and duly enrolled in Chancery. Two months after Inrollment, Livery is made, and indorsed on the Deed. The Plaintiff and Defendants Wife were both Grandchildren to Isaac Ash, who by Lease and Release did convey the Lands in question, the one Moiety to the Plaintiff, and the other Moiety to the Defendants and their Heirs; and the Plaintiff did not except to this disposition in Isaac's Life; which if he had, Isaac would (as was insisted for the Defendants) have otherwise provided for them,

them, he having given every Grandchild to the value of 50 l. per annum, but the Defendants, to whom he gave nothing but the Polety of the Premises.

For the Plaintiff it was insisted, That Isaac intended to take the Estate by Feoffment, and that the inrolling of it first was only for safe custody of the Deed; and that however the Uses upon a Use would not rise in Law, yet in Equity they were good by way of Trust.

Whether a Use upon a Use in a Deed inrolled be to be supported in Equity as a Trust.

For the Defendant it was argued thus upon private discourse of Council, That Isaac having by the Deed an election to take it either by Feoffment (which if he did, it would not be in his power otherwise to dispose it) or by Bargain and Sale, whereby he might have power to dispose the Estate as he pleased; and he having elected to take it by Inrolment, and disposed the same by Act executed in his life, it was apparent he intended to take it so as to dispose it, and therefore no reason in Equity to make any other operation of this Conveyance than the Law made.

There was some diversity of Opinion amongst Council touching this Case; but the parties agreed among themselves, and it was not argued at all.

*The Lord Keeper.
Justice Twisden.*

Read against Read. Novemb. 25.

The Lady Read, Wife of Sir John Read, had by Petition got a Ne exeat Regnum against her husband, upon suggestion that he having gotten a Sentence for Alimony against him in the Spiritual Court, he refused to obey it, and in avoidance of it threatened to go beyond Sea.

The husband moved for a Superfedeas of this Writ, and Whether it lies in this Case? was the Question.

For the husband it was said, That every man may travel where he will, unless he be prohibited by the King's Writ, Dyer 296. This Writ is a Prerogative-Writ, which the King may use as he hath the care of his People, 2 Inst. 54. A Writ de Securitate inveniendā, not to go beyond the

The nature of a Writ of Ne exeat Regnum.

Q 2

Seas,

Seas, lies not against a Layman, but a Clergyman only, qui habet Curam Animarum, and they are to maintain the Laws of the Church, which if they went beyond the Seas, they might adhere to the Pope, and they have no Temporal Estate to oblige them to stay here; and this Writ ought to be indorsed Patronus sequitur hoc Breve; but in this Case no Patron, no Clergyman. 19 Jac. in the Case of Welby and Stevens, at the Suit of his Creditors, which were many, there this Writ was granted; but a Bill was filed, and non here. Crisp against Bishop, 15 Car. 2. The Writ granted upon suggestion he was indebted; but on putting in Security, it was superseded.

On the other Side, for maintaining of the Writ, and on the behalf of the Lady, it was said, The King may restrain a Subject from going out of the Realm, Knowls against Luce, Moor 109. Selden's Janus Angliae 92. saith, It extends tam Laicis quam Clericis. There is no other Writ but this; and if this go not to a Layman, then there is no Writ to a Layman. It's true, all Writs in the Register are Clericis; but that's but an Addition. The ground of the Writ is, That a person is going beyond Sea to the prejudice of the King; and the Writ is to give Security not to go till the King license him. Leigh against Bever, 9 Jac. A President, 9 Car. 1. Mead's Case, a Ne exeat Regnum awarded for a private matter. Hill. 52. Boyl against Slugborough, it was a Question, Whether this Writ was grantable at the Suit of a private person?

But the Court resolved this Writ well lies in the principal Case, and will not supersede it.

A Ne exeat Regnum lies for a private matter without a Bill.

*The Lord Keeper.
Chief Baron Hales.
Justice Archer.*

*Dame Margaret Pridgeon, Relict of Sir Francis Pridgeon,
against the Executors of Sir Francis Pridgeon in Trust
for Robert Pridgeon, &c.*

After several Debates on both sides before the Lord Keeper, this Cause came to be further heard by him in Novemb. 1668. assisted with the Lord Chief Baron Hales and Judge Archer. And the Case was thus:

The Plaintiff being a Widow, at her Marriage with Sir Francis Pridgeon, suggests an Agreement precedent to the Marriage, between him and her, and others on her behalf, That notwithstanding her Marriage, the Rents and Profits of all her own Estate, and what Personal Estate and Goods she had, should be at her own dispose; and that she was possessed of certain Goods, &c. before her Marriage with him, which the Defendants, the Executors of Sir Francis, claimed, as being his Executors in Trust for the said Defendant Robert, his Nephew and Heir, which by the said Agreement she claimed.

For the Defendants it was insisted, That if any such Agreement were with Sir Francis before the Marriage, it was extinguished by the Marriage; and so cited Smith and Stafford's Case, Hob. 216. and the Earl of Suffolk and Greenvil's Case; and insisted, Such-like Agreement ought not to be countenanced in Equity, being derogatory to the Rights and Privileges of Marriage. And on the debating the matter of this Cause, a Case between Scot and Brograve, about 1639. in this Court, was cited, which was thus:

The Wife of an unprovident Husband had, unknown to him, by her Frugality raised some Moneys for the good of their Children, which she had disposed for that purpose, being otherwise unprovided for; and this disposition of the Wife the Lord Coventry had established by a Decree. But afterwards, upon a Review, and Assistance of the Judges,

Agreement between Husband & Wife before Marriage extinguish'd by Marriage.

This Case of the Earl of Suffolk was in the Commissioners time.

Scot ag. Brograve about 1639.

The Wife may not be suffer'd, tho' to good Uses, to dispose of any Money she hath rais'd out of her Husband's Estate by this Frugality.

*Gorges against
Chancy, Mich.
1639.*

*A disposition by
Feme Covert of
Moneys raised
out of separate
Maintenance,
good against the
Husband.*

this Decree was reversed, as being dangerous to give a Feme power to dispose of her Husband's Estate. And another Case between Gorges and Chancy, which was about Michaelmas-Term 1639. was cited, which was to this effect:

Baron and Feme by Agreement separated and lived apart, and agreed that the Wife should have 150 l. per annum separate Maintenance, out of which she had saved some Money, and put it out to Interest, and took Bonds in a Friend's Name, and disposed the Money by Will; and this upon Debate was established a good disposition; and this was now declared to be a just Order.

But note, That in this Case it was an Agreement after Marriage with Friends in the behalf of the Wife for a separate Maintenance: But in the principal Case the Chief Baron declared, That though where an Agreement is between Baron and Feme before Marriage, that the Wife may by Will dispose of part of her Estate, or for a thing which is future to the Marriage, such an Agreement is not dissolved by the Marriage; yet where an Agreement is to have Execution during the Coverture, as in the principal Case, there the Marriage extinguisheth such an Agreement. And the whole Court concluded the Plaintiff had no ground for Relief; and declared she had no Cause of Suit but by way of anticipation; for the Executors did not claim the Goods, but she feared the other Defendant, the Infant, for whom they were Executors in Trust, would claim the Goods, &c. Yet the Court declared, That they would farther consider of the matter, and the Cause hath not yet received any farther hearing.

D E

Term. Sanct. Hill.

Anno Regis 20 & 21 Car. II.

I N

CANCELLARIA.

The Lord Keeper.

Goddard against Complin. January 27.

Tenant in Tail demiseth his Lands for Ninety nine years by way of Mortgage, and after marries; and in consideration thereof, and of 500 l. Portion, suffers a Recovery, to enable him to settle a Joynture, and afterwards takes up more Money of the Mortgage upon the former Security. The Joyntress was Plaintiff, and the Question was, Whether the Defendant should be allowed Money lent after the Recovery and Marriage?

Where a Mortgagee lent new Money on his old Security without notice of an intervening Settlement, shall be allow'd it.
Hard. 118.

And the Court declared, That if the Defendant had no notice of the Joynture when he lent the new Money, he must be allowed it.

Another Question was, Whether the Defendant had proved Payment of the Money supposed to be lent? And as to that, there was the Receipt in the Deed of the Mortgage, the Condition of Redemption on repayment of the Money, and the Defendant's Oath that he had paid it, which was

What is good proof of payment of Money against a Purchaser.

indited

insisted on, was Evidence enough of payment after ten years against any person, and so the Court inclined.

But the Plaintiff standing upon it, That it was not sufficient Evidence as against the Plaintiff, who claimed as a Joyntress, there was farther Evidence.

A Recovery subsequent to a collateral purpose, shall enure to make good precedent Estates.

There was also this Question put: Tenant in Tail mortgageth for years, and afterwards upon Marriage in consideration thereof suffers a Recovery to settle a Joynture, &c. Whether this Recovery should enure to make good the Mortgage, it being designed for the Marriage-Settlement only? Which was answered. If no Recovery had been, there could have been no Joynture; and the Joyntress could not have avoided the Mortgage; and she is in by the act of her Husband, and no subsequent act of the Husband could avoid his own act precedent. And it was also declared, That if Tenant in Tail confess a Judgment, &c. and suffer a Recovery to any collateral purpose, that Recovery shall enure to make good all his precedent Acts and Incumbrances.

The Master of the Rolls.

Collet against Jaques. Febr. 8.

Rent and Arrears of it decreed (the Deed being lost) because it did not appear what kind of Rent it was.

Leish. 24, 146.

Ans. 78.

The Bill was for 3 l. for a Rent of 5 s. per annum, Arrear for twelve years. The Plaintiff suggested, That the Deeds by which the Rent was created were lost, and also the Rent for the future; and there was proof of a constant payment of it till the last twelve years. And the Master of the Rolls decreed the Defendant to pay the Arrears and growing Rent, because he said it was uncertain what kind of Rent it was, and so no Remedy at Law; and here the person is made liable for the Rent, which for ought appeared he was not at Law.

The

The Master of the Rolls.

Duncumban, an Infant, against Stint, Executor of Stint.
February 1.

The Defendant's Testator gave the Plaintiff 1000 l. to be paid at the age of twenty one years. An Executor decreed to give Security for a Legacy.
The Bill suggested the Defendant wasted the Estate, and prayed he might give Security to pay this Legacy when due; and the Master of the Rolls did accordingly decree the Defendant to give Security.

The Master of the Rolls.

Eaton-College against Beauchamp and Riggs. Febr. 5.

There was a Rent or Pension of 1 l. 14 s. per annum, granted by R. H. 6. to that College, issuing out of Lands. Riggs was Executor of the Terr-tenant, and to be relieved for the Arrears of Rent incurred in his Testatrix life-time was this Bill brought, which did suggest, That the College did not know the Lands out of which the Rent went, and so would not distrain. Beauchamp was the present Terr-tenant; and tho' the person of the Terr-tenant was not chargeable with the Rent at Law, but only the Land by way of Distress; yet, soasmuch as the Testatrix held the Land, and did not pay the Rent, it was said, That thereby the Personal Estate of the Testatrix was augmented. And so the Master of the Rolls decreed the Executor to pay the Arrears as far as he had Assets of the Testator's Estate. An Executor decreed to pay Arrears of Rent which the Testator's person was not liable to.

The Lord Keeper.

Justice Tirrel.

Justice Moreton.

Slingsby against Hale. February 14.

On a Demurrer.

The Bill was, a Bill of Review to reverse a Decree made about twenty years since, wherein the Mortgagee being Plaintiff against the Mortgagee to have a Redemption, it was decreed accordingly, paying the Money to be found due on Account; and for that purpose referred to a Master to take the Account. And it was also decreed, That if the Plaintiff failed to pay the Money at a day to be set by the Master, the Defendant should hold discharged of all Equity of Redemption.

Pending the Reference the Suit abated by the death of one of the parties Defendant: yet the Account went on, without any notice taken to the Court of the Abatement; that the Executor being a Defendant to the Original Bill, the Master was attended on the behalf of both sides, and made up his Report, and that confirmed and decreed, and that Decree enrolled near twenty years since. And now the Plaintiff being Devisee of the Mortgagee, by Bill of Review assigns these Errors, and now excepts against the Decree.

First, For that in respect of the Abatement, there was no Cause in the Court when the Account was stated, and the Decree drawn up and enrolled.

Secondly, That it was Error for the Court to make a Decree for the Defendant to hold free of Equity of Redemption on the Plaintiff's Bill.

The Demurrer was, in nullo Erratum, and the Plaintiff not intitled to a Bill of Review.

Proceedings after
an Abatement de-
creed and enrolled,
no Error or cause
of Reversal.

To the first it was answered, It was only an Exception in point of Form, and not in point of Right; and that the Account being stated and settled, ought not after such length of time to be let loose or unravelled into; and as to this

this Point cited the Case of the Lady Cranbourn and M^r. Dalmahoy.

And as to the second, it was said, That Circuity of Action is to be avoided, and that there were many Presidents of Decrees in this manner for the Defendant; and that what was decreed for the Defendant was most just, and could not be denied upon the account of Justice.

And the Court declared they saw no cause to alter the Decree; and so allowed the Demurrer, and dismiss'd the Bill.

After a Complaint of this in the Lords House, the matter of the Demurrer was re-heard March 9. 1670. by the Lord Keeper, Chief Justice Hale, and Vaughan; and on long debate they seemed to incline against the Plaintiff, but took time to consider. And after, 21 July, 1671. they all three deliver'd one uniform Opinion clearly, That the Plaintiff being Devisee, is not intitled to a Bill of Review, being not in privy to the Testator, against whom the Decree was: as, if a Judgment be against Land, and the Owner aliens the Land, the Alienee cannot bring a Writ of Error, nor the Vendor. And so dismiss'd the Bill for this reason principally. Yet the Keeper and Chief Justice Hale were of Opinion that the Error assigned was no sufficient Error to avoid the former Decree, but notwithstanding the Abatement the Account ought to conclude; and stand as an Account stated.

A Devisee cannot maintain a Bill of Review, because he is not in privy.

Justice Wyld.

Weymberg against Tough. February 24.

On a Demurrer.

THE Bill was, to be relieved against an Action of Debt for Money due to the Defendant as a Merchant from the Plaintiff, for Wares sold in Denmark. The Equity was, That in the time of hostility between that Crown and this, the Defendant being a Subject to this Crown, the Plaintiff was forced to pay the Money he owed the Defendant to Commissioners authorised in that behalf to the King of Denmark; And that by the Articles of Peace between the two Crowns it was agreed, That all Moneys

Where Articles of Peace between two Crowns can discharge a Subject's Debt.

to exacted from each others Subjects should be compensated by setting one against the other; and that the parties that paid the Money to either of the Kings Orders, should be discharged against the Creditor.

To this Bill the Defendant demurred, and insisted there was no Equity; and that if the Articles did bind private persons, they were as good at Law as here; but at Law they did not bind, for the Defendant had a Verdict.

Chancery a Court
of State.

For the Plaintiff it was insisted, That the Chancery was a Court of State; and that the Articles of Peace were enrolled there; and that the Bill was, to have Witnesses examined beyond Sea. The Judge ordered the Defendant to answer.

The Lord Keeper:

Marah More against Nicholas Grice and others.

The Plaintiff Marah's Mother was Sister of the Defendant Grice; and by Articles of Agreement made between Thomas More the Plaintiff's Father, and Nicholas Grice the Defendant (in behalf of his Sister the Plaintiff's Mother) it was agreed, That in consideration of 800 l. agreed to be given with the Plaintiff's Mother in Portion to the Plaintiff's Father (whereof 600 l. was Nicholas's own free Gift) That the said Nicholas should stand seized in Trust of the Lands in question, as a Joynture for the proper Use of the Plaintiff's Mother for and during her natural Life, the Remainder to the Issue of her Body (which the Plaintiff only is) the Remainder to the right heirs of Thomas More. These Lands were in truth mortgaged by More before, and the Defendant did pay him 500 l. of the Portion, and was wrought upon by him to deliver up the Articles, and for 5 l. to release to More the Lands; and More and his Wife had by Deed and Fine sold the Lands away; and so to be relieved against the breach of Trust was the intent of the Bill.

And for the Plaintiff it was insisted, That the Defendant ought to make good to the Plaintiff the value of the Lands ever since her Mothers death, who died about twenty years since, and the full value of the Lands, if to be sold (by the Agreement the Lands being to come to her immediately after her Mothers death.)

But

But for the Defendant it was insisted, That if there were a breach of Trust, it was no ill intent in him, nor anything to his benefit, but to comply with the necessity of the Plaintiff's Father, (who is still living;) and if a Settlement had been made according to the Articles, it might have been so awarded, that he and his Wife might have prevented the Estate from coming to the Plaintiff. And they did after sell the Lands by a Fine; and however the Plaintiff's Father, according to the true meaning of the Articles, was to have had at least an Estate for Life in the Lands: for it was absurd to think that the Husband in Marriage should settle his Lands on his Wife and her Issue, and exclude himself for Life; and being mentioned in the Articles, that the Wife should have them for a Joynture, and after to her Issue, the very word Joynture did imply that the Husband should have an Estate for his Life as well as the Wife, and that was the usual way of settling Joyntures for Life on the Husband, and then in Remainder to the Wife for Life. And it was said, That if a Bill had been brought against More to compel him to make a Settlement according to the Articles, the Court would never have excluded him of an Estate for his own Life. And of this Opinion the Lord Keeper declared he was as to the Husband's Estate for Life, and that he ought to have the Premises by intention of Agreement for Life. And therefore, and inasmuch as 600 l. of this Portion was agreed to be given by the Defendant as a free Gift of his own, and it was uncertain what the value of the Lands might be after the Plaintiff's Father's death, and there was 300 l. of the 800 l. unpaid, the Lord Keeper proposed, That the Plaintiff should have the said 300 l. with Damages, and the Defendant to pay it her accordingly. And so it was decreed.

The word *Joynture* in an Agreement implies that the Husband shall have an Estate for Life as well as the Wife.

D E

Termino Paschæ.

Anno Regis 21 Car. II.

I N

CANCELLARIA.

Hele against Stowel. May 8.

The husband devised his Lands to his Wife during the Minority of his Son, and dies, and hath only a posthumous Son, and by his Will gives his Wife power to make Leases to raise Money to pay Debts, &c. The Wife enters, and takes the Profits, and then marries a second husband, and he lives some years, and takes the Profits, and dies, and the Wife continues to take the Profits of such part of the Land as she had not let, for she did let some part according to the Will. This Son attains his Age, and proves a Revocation of the Will, and prays his Mother may account.

Where Rents taken by colour of a Title that's avoided, the Receiver shall be accountable as a Bailiff.

OrdereD, That she shall account for all the Profits that her self or her Husband took; and the reason was, that she should be said to take them till the Infant was fourteen years of age as Guardian, and after as Bailiff; and she was to answer as to what her Husband took, as in a Devastavit; the Wife having no notice of the Revocation, had paid Legacies charged on the Lands by Will.

Legacies paid by colour of a Will which is after found to be revoked, allowed.

OrdereD, That she be allowed those. But as for the Leases she had made, tho' they were for Fines and full Rents, tho' she offered to account for the Fines and Rents, the Court would not make them good, because the Mother could not set, or let Lands.

The

*The Lord Keeper.
Justice Rainsford.
Justice Wyld.*

Holtcomb against Rivers. May 10.

The Defendant and one Collins were Factors for the Plaintiff in Spain before 1654. In that year they sent him to London on account, and charged themselves with divers Goods of the Plaintiff in specie. In 1656. there hapned an Imbargo on English Ships and Goods in Spain, and a Seizure of all the Goods in the Defendant's and Collins's hands, and on their Books, and the Defendant was cast in Prison on that account, and the Bill was now to call the Defendant to an Account (Collins being dead) without making his Executrix a party.

For the Defendant it was insisted, That by reason of the Seizure and Imprisonment he could not account, having lost his Books, and never seen them since; and that the Plaintiff had been twice over with Collins's Executrix, and she was no party; and that after this length of time, it would be hard to draw the Defendant to an Original Account.

Court. It was resolved for Law, That (tho' inter Mercatores jus accrescendi hath no place) yet the surviving Factor was to account for what was made by himself or Co-Factor; and yet it was agreed that in this Case an Account lies against the Executrix of the dead Factor. And so it was ordered, That, in respect of the length of time since the Account was sent, and no clear Proof of any Exception to it till after the Seizure; and that when the Account was sent over, the Plaintiff was writ to, to send his Exceptions speedily, if any he had, that the Account should not be ravelled into, but ordered the Defendant to account for, and satisfy what had been made by Sale of the Goods remaining in specie in the former Account before the Seizure. But in regard of the length of time, and the loss of the Books, (which the Defendant had sworn by his Answer) it was ordered, That the Defendant should not be charged in this Account for more than according to his own Oath

The surviving Factor is answerable for himself and Co-Factor.

The Executor of the Co-Factor first dying is accountable.

An Account rested upon 14 years is conclusive.

what

Where an Accountant having lost his Papers by no fault of his own, shall not be charged beyond his own Oath.

what was made, or he did remember or believe was made by the sale of those Goods. And with these directions, it was referred to Merchants to take the Account, who made a direction tending to draw a harder direction from the Court upon the Defendant in the way of his accounting. Whereupon his Lordship appointed to re-hear the Cause, and the same was accordingly re-heard by him, assisted Mr. Justice Rainsford, and Mr. Justice Wild; and upon long debate, the former Order was confirmed.

Prat against Colt. May 11.

On a Demurrer.

A Trust of Lands no Assets.

The Plaintiff had a Judgment against George Holt, and brought his Bill against his Heir, to subject certain Lands which he had a Decree of this Court for, upon a Trust for his Father and his Heirs to satisfy his Debt; and the Defendant demurred, and this Demurrer allowed: And the Lord Keeper conceived it all one with Bennet and Box's Case. But quære, since the Statute of Frauds and Perjuries.

DE

D E

Term. Sanct. Trin.

Anno Regis 21 Car. II.

I N

CANCELLARIA.

The Lord Keeper.

Justice { *Twisden.*
Wyld.
Rainsford.

Vachel against Vachel and Lemmon. July 1.

TAnfield Vachel, by his Last Will in Writing, be-
 seth to the effect following, (viz.) I give the Use
 of all my several Paintings, and Books of Print, my
 coloured Collection of Medals in Gold, Silver, and Brass;
 all my rare Turnings of Ivory and Guaiacum, with my Press
 of Books, and Chest of Drawers with the Perspective in
 it, to my dearly beloved Wife (the Defendant, Rebecca
 Vachel) during the Term of her Natural Life. And my
 Will is, That if she be with Child of a Son, that then
 after her decease the same Paintings, Books of Print, &c.
 shall be left, remain, and come to the same Son. But if
 my Wife be not with Child of a Son, or if the same Son
 shall die without Issue-Male of his Body, then my Will
 is, That all the said Paintings, Books of Print, &c. after
 the decease of my said Wife, and the death of such Son

as my Wife is now with Child of, shall come and remain to the use of *Thomas Vachel* (the Father of the Plaintiff) of which my Will is that the said *Thomas Vachel* shall have the use only during his Life, and that he leave them to my Kinsman *Thomas Vachel*, his Son, (the Plaintiff) and that he shall, as far as in him lies, so dispose thereof to him that shall by God's Blessing next succeed himself in my Manors and Lands in the County of *Berks*, that they remain as an Heir-loom, and go and remain to such person and persons as shall inherit my said Manors and Lands, who I desire may prove Lovers of Learning, Ingenuity, and Arts. Which Clause the Defendants insisting to be revoked by a Codicil, and the Matter as to that Point having been fully heard, and his Lordship having had the Opinion of Civilians therein, did on the first of May last declare his Judgment to be, That the Use of the aforesaid Rarities was well settled by the Will of the said Testator upon the Plaintiff *Thomas Vachel* after the death of the said Defendant *Rebecca Vachel*, and not revoked. But the Defendants Counsel then insisting, That tho' they were admitted to be agreeable to the Civil Law, yet the very Limitation in the Clause of the Will of the Rarities to the Plaintiff was void by the Common Law. His Lordship for the Defendants farther satisfaction, declared he would have the Opinion of the Lords the Judges therein, upon that single Point of the Limitation of the Rarities, whether the same were a good or void Limitation. And the Cause now standing in the Paper for a determination in that Point, his Lordship declared he had advised with the Lords the Judges, and now assisted with Mr. Justice Rainsford and Mr. Justice Wyld, upon deliberate Consideration had of the Clause aforesaid, in the Will, whereby the Use of the Rarities are devised to the Plaintiff after the death of the said *Rebecca Vachel*; And so much as the said *Thomas Vachel* the Plaintiff's Father died in the life-time of the said *Tanfield*, and the Defendant *Rebecca* being not with Child of a Son, so as the contingencies upon which the Limitation was made never happening, his Lordship with the Lords the Judges were all clear of Opinion, That the Devise to the said *Thomas Vachel* the Son, was an absolute Devise, and good in Law, and that the Defendant *Rebecca Vachel* ought only to have the Use of the said Rarities during her Life only, and the Plaintiff is to have the same after her death, according to the said Will; and doth order and decree the same accordingly, and that the

Defendant

A Limitation of personal Chattels to one during life, Remainder to another, good.

Defendant be examined upon Interrogatories for the discovery of the particulars of the Barities and Matters so devised, and that an Inventory of the said Barities be made according to the said Order of the first of May. And as touching Security now prayed by the Plaintiff's Counsel, and other Matters for final compleating this Decree, the Court declared, That the same was not the proper business of this day, and they would not now determine the matter, but leave the Plaintiff to move this Court therein, and then such farther Order shall be made as shall be just.

The Lord Keeper.

Twisden.

Justice { *Rainsford.*

{ *Wyld.*

Wood against Sanders, or Sanders against Wood.

July 1.

A Long Term of years was assigned upon a Trust to permit the Father to receive the Profits for sixty years, if he live so long; and after his death to permit the Mother, his Wife, to receive the Profits for sixty years, if she so long live; and after the death of the Father and Mother, to permit John the Son his Executor, &c. in case he survive his Father and Mother, to receive the Rents, &c. And that the Trustees, at the request of John, after the death of his Father and Mother, should assign to him, his Executors, &c. But if John die in the life-time of his Father and Mother, and leave Issue, which shall be living at the death of his Father and Mother, then the Trustees to assign the Premises to such Son of John which shall be his eldest Son at that time, &c. But if John die without Issue before any such Assignment, that then the Trustees shall permit Edward, another Son of the said Father and Mother, and the Heirs of his Body; and in default of such Issue, Nicholas, a third Son of the same Father and Mother, and the Heirs of his Body; and for default of such Issue, the Executors, &c. of Nicholas to receive the Profits of the Premises during the Term, to their own Uses. John dies Intestate in the life of

his Father and Mother, and without Issue, and before any Assignment the Father and Mother die; Edward the Son enters and receives the Profits, and dies Intestate without Issue; Elizabeth his Wife takes Administration, enters and receives the Profits; Nicholas the third Son takes Administration to John his Brother, and procures the Trustees to assign to him.

The Question was, Who hath the Right to this Lease? whether *Nicholas* the Administrator of *John* (who died in his Father's Life) or the Administrator of *Edward*, who enjoyed during Life, or *Nicholas* the third Son in his own Right?

Where the Trust of a Term is to one for life, the Remainder for life, the Remainder to a third person (if he outlive the Tenant for life) the Remainder to another & his Heirs, that the Remainder to the third person (he dying before Tenant for life) does not vest it in his Executors.

It was unanimously resolved, That where the Trust of a Term is to one for Life, the Remainder for Life, the Remainder to a third person for the whole Term (if he outlive the Tenants for Life) the Remainder to another as Heir to Edward the Son, and the Heirs of his Body, that the Remainder to the third person, viz. John, being meerly contingent, was not so vested in him, as that his Executors could have it, he dying before his Father and Mother; and that the Contingency not happening, he dying in the Life of Tenant for Life, the Remainder over to Edward was well limited after such a contingent Remainder. Vide as to this Point the Case of the Duke of Norfolk.

DE
Term. Sanct. Mich.

Anno Regis 21 Car. II.

IN
CANCELLARIA.

The Lord Keeper.

Smith against Palmer. October 25.

UPON a difference between the Plaintiff and one John Browning, an Award was made that Browning should pay the Plaintiff 5 l. in hand, and 23 l. at several days, and for that purpose Browning to enter into a Bond of 50 l. Penalty. This Bond was taken in the Name of Brown. Browning exhibits his Bill against Smith and Brown, suggesting a Fraud in obtaining the said Bond, and that he same was in Trust for Smith. Smith and Brown join in an Answer to that Bill, and there Smith swears, That he was indebted to Brown more than 23 l. and that Browning being awarded to pay him that 23 l. Brown did accept of that Bond for so much of what Smith owed Brown; and so said it was not upon any Trust for Smith, but taken to Brown's own use, Brown being dead, and the Defendant his Executor. The Plaintiff Smith by his now Bill seeks to have the Bond out of Brown's Executors hands, and chargeth his Name to have been used in Trust for the Plaintiff.

The

The Defendant pleads the former Answer in the other Cause, and that thereby the now Plaintiff had denied any Trusts in Brown for him, and swore the Bond was taken in Brown's Name for his own Use, prout.

A Trust decreed for a person who in his answer on Oath in another Cause had deny'd the Trust, because drawn in to answer by fraud.

The Plaintiff replied, That Brown was his Solicitor in the other Cause, and that he answered by his Advice, and that he advised it was fit to answer to them, and for that purpose advised the now Plaintiff, before he put in that Answer, to enter into a Bond to Brown for more Money, that so he might swear as he did in that Answer; which Bond he promised Smith to deliver back when he had put in his Answer; and did so, and averred he was at the whole Charge in defending the Suit, and that Brown after that Answer owned the Trust in that Bond of 23 l. for the Plaintiff; and there was proof of that.

And upon the hearing of this Cause, it was taken to be a fraud in Brown to draw the Plaintiff in to put in such an Answer upon Oath in the other Cause, that the Bond was in Trust for him: And the Defendant was decreed to deliver up the Bond to the Plaintiff, with a Letter of Attorney to put it in Suit.

At the Rolls. The Master of the Rolls.

Richard West Clerk, and divers others the Churchwardens and Overseers of the Poor of Great Creaton, against Knight and his Wife, Executrix of John Palmer. Octob. 27.

John Palmer had by Will given 50 l. to the Parish of Great Creaton, where he was born, (without saying to what use.) The Minister, Churchwardens and Overseers for the Poor exhibited this Bill for the 50 l. suggesting, That he intended it for the benefit of the Poor.

The Defendant the Executrix confessed the Devise, and offered, if she were bound to pay it, to assign some Security for Money owing to the Testator to satisfy it.

10 May, 1669. this Cause was first heard by the Master of the Rolls. And it being then insisted by the Defendant's Counsel, That the Devise was void, and that the Parish being no Corporation, could not sue for it by Original

ginal Bill; and that it was a void Devise, for that there was no Use limited touching the 50l. whether it were for the Poor, or for Repair of the Church, or High-ways, &c. And it was stood upon, That if the Plaintiff had any ground of Relief, it must be by Commission of Charitable Uses, and not by Bill. The Master of the Rolls ordered Presidents to be produced before he would deliver his Opinion.

And now at this day, upon farther hearing the Cause, a Decree of this Court, 30 June, 1657. was produced, St. John's College against Plat, where upon the Advice of four Judges it was resolved, That upon an Original Bill the Chancery might relieve within the Statute of Charitable Uses. And therefore, inasmuch as the 50l. was the Personal Legacy, and no devise of Lands, decreed, That the 50l. be paid as far as the Defendants have Assets of their Testator, and directed it to an Account to see what Assets, and the Master to whom it was referred to see the Money disposed for the benefit of the Poor of the Parish.

Relief given by Bill on the Statute of charitable Uses.

Money given to a Parish generally without saying to what use, decreed to the Poor of the Parish.

*The Lord Keeper.
Justice Windham.
Baron Turner.*

Nelthrop and Margatet his Wife, against Hill, Biscoe, and Anne his Wife. October 6.

This Cause was heard first before the Lord Keeper. The Case. The Plaintiff Margaret and the Defendant Anne were the two Daughters of Smith, who having made his Will eighteen years since, and Hill Executor and Curator of the Children (both then in Infancy) by his Will gave several Legacies, and then gave the residue of his Personal Estate to be equally divided between his two Daughters, Anne and Margaret; and if both die before Marriage or full Age, then he devised it over to another. Biscoe married Anne the eldest Sister, and was one Heir of the Estate, which was good, and in the hands of the Executor, is paid to Biscoe and his Wife, and Biscoe

Biscoe settles a Joynture for this on his Wife, and gives the Executor a Discharge.

Afterwards the Executor puts out the other Poſety (Margaret being ſtill in Minority) on Security, and part of it is loſt. Then Margaret marries Nelthrop, and they bring this Bill againſt the Executor, and Biscoe and his Wife to have a Contribution towards the loſs born by them, and to have Biscoe refund.

Upon the firſt hearing it was ſo decreed, unleſs Biscoe ſhewed Preſidents to the contrary.

Now upon farther hearing this day, (viz. 10 Jan. 1669.) beſore the Lord Keeper, Mr. Juſtice Wild, and Mr. Baron Turner, it was for Biscoe inſiſted, That by the Marriage of Anne, her Poſety became due, and the Deviſe over is defeated: So that if Biscoe and his Wife had brought their Bill for it, the Executor could not have denied payment of it, and ſo Biscoe hath done no default, who hath not his Money till due, and he is not concerned to look any farther; and in lieu of the Portion a Joynture is made, and a Release for the Legacy is given; and probably, if the Executor would not have paid, Anne might have loſt her Preſerment, and the Executor was by the Will the Curator of the Childzen. And it was ſaid, That by Anne's Marriage firſt, ſhe became firſt entitled. And it was inſiſted, That where Legacies are payable at ſeveral times, and the Legacy that is firſt due is paid when due, and there is Money in the Executor's hands to pay the other Legacies, that if a loſs fall on that afterwards, there is Equity in that Caſe to put the firſt paid Legatee to refund.

For the Plaintiff it was inſiſted, That there was in this Caſe no time limited for payment of either; and that by the Marriage of Anne, the Deviſe over being defeated, both became due and payable, the Deviſe being indefinite. without any expreſs time of payment; and the Plaintiff Margaret's Infancy ought not to turn to her prejudice; and that it was the Teſtator's intention that they ſhould have it equally, one as much as the other. And if Biscoe had ſued, the Executor might have required Security to refund.

Where a Legatee
ſhall refund for
want of Aſſets.

And it was ſaid and admitted by the Court, That if Executors pay out the Aſſets in Legacies, and afterwards Debts appear, and they be forced to pay them, of which they had no notice beſore the Legacies paid, That the

the Executors by a Bill here might force the Legatees to refund.

But as to that it was answered, That Case was not like to this; for there was not enough to pay all when the Legacies were paid, but here was enough when the Legacies were paid to pay all, and the loss since.

And for the Plaintiff it was farther insisted, That a division could not be made without the Plaintiff Margaret called to it; and the Case of Grove and Banfon insisted on, where Banfon had a Conveyance and Statute for his Wife's Legacy, and yet put to refund.

But as to that Case it was answered, There was not any Payment, but a Security, and by that he would have had a Redemption; so this Payment was not paid, but executory. And the Plaintiff cited the Case of *Picks and Vincner* Picks ag. Vincner, 29 Octob. 1639. upon Sir Henry Martin's Certificate, which was 29 Octob. 1639. and was in substance thus: That an Executor may not pay one, if he hath not enough to pay all; and an Executor is not bound to pay a Legacy without Security to refund if there be want of Assets to pay either Debts or Legacies. Which was not, as is said, to this purpose, there being at the time when this Legacy was paid, enough to pay all. Executor not bound to pay a Legacy without Security to refund.

Ordered the Cause be set down to be re-heard originally, as well against the Executor, as the Legatee Biscoe and his Wife.

Quære, If there be not a difference between Debts and Legacies thus: Debts may appear to the Executors, but Legacies appear in the Will? And quære, If therefore Executors be not bound more strictly to take Security against Legacies that do appear, than Debts that do not?

The Master of the Rolls. First Hearing.

Charles Fry Gent. and the Lady Anne his Wife, and Mountjoy Fry an Infant, by their Guardian, against George Porter an Infant, by George Porter his Uncle and Guardian. October 13.

3. Nov. 352.

Mountjoy Earl of Newport had two Daughters, Isabella, who by his consent married Nicholas Earl of Banbury, (whose Daughter the Plaintiff the Lady Anne is) and Anne, who without her Father's consent married Thomas Porter Esq; by whom she had George the Defendant the Infant.

The Earl of Newport being seized of Newport-House in Fee, by his Will in writing deviseth in these words:

Item. I give and bequeath unto the Lady Anne Countess of Newport, my dear Wife, all that my House called Newport-House, and all other my Tenements in the County of Middlesex, for her Life; and from and after the death of my said Wife, I do give my said House, and all other my Tenements in Middlesex, unto my Grandchild the Lady Anne Knowls, the Daughter of Nicholas Earl of Banbury by the Lady Isabella, my late Daughter, and the Heirs of her Body to be begotten. Provided always and upon condition, That my said Grandchild the Lady Anne Knowls do marry with the Consent of my said Wife, and of Charles Earl of Warwick, and of Edward Earl of Manchester, or the major part of them. And in case the Lady Anne Knowls do and shall marry without the Consent of my said Wife, or the major part of my Trustees aforesaid, or shall happen to depart this Life without any Issue of her Body, then I will and bequeath all my said Premises unto my Grandchild George Porter, Son of my deceased Daughter the Lady Anne, late Wife of Thomas Porter Esq; and to his Heirs for ever.

The Plaintiff Fry, after the death of the Lord Newport, stole away the Plaintiff, the Lady Anne, in the night from Newport-House, (where she lived with her Grandmother) over the Garden Wall; and so soon as she was missed

missed by her Grandmother, and she was informed of this fact, she sent to the Earls of Warwick and Manchester, to inform them of it, who both protested against the Marriage as unfitting for the young Lady, who was at that time about fourteen years of age, and declared their utter dislike of it. Afterwards these two Earls being examined for the Plaintiffs as Witnesses in the Cause, say, That they do assent to the Marriage; and that they do not know but that if their Consents had been asked for before the Marriage, such Reason might have been given as they might have consented to it. And they and other Witnesses speak as to the Earl of Newport's intent, and frequent Declarations, that the Plaintiff the Lady Anne should have Newport-House, which the Plaintiff's Counsel would lay weight upon to interpret the meaning of the Will to be in *terrorem* only, and not to defeat the Devise to the Lady Anne.

The Bill was to be relieved against the Condition and the Breach of it.

And for the Plaintiffs on the first hearing, which was before the Master of the Rolls only (in the Lord Keeper's absence) it was insisted on by Serjeant Fountain, That there were three things in Equity, upon which the Plaintiff ought to be relieved against this Penalty.

1st. That there was no other reason for this Condition and Penalty, but to prevent the Lady's Marriage without Consent, and therefore it was to be expounded *in terrorem* only.

2^{dly}. That this young Lady was but fourteen years old, and knew nothing before her Marriage of the Condition.

3^{dly}. As she was in her Infancy, and knew nothing before her Marriage of the Condition, so soon after as she did know it, she did go to the two Earls (her Grandmother being dead) and they did approve of the Marriage.

For the Defendant it was insisted, That the Infancy or want of notice to her of the Condition, was of no weight, for that there was not by the Will any Provision made, or any Directions given to give her notice, but as she takes by the Will as a Purchaser, so she must take it subject to such Condition as the Will hath subjected it to, and is to take notice at her peril; and an Infant may break a Condition; and this Act of hers in marrying was but what the Earl had reason to expect she would do before she

Where the Legacy, on condition the Legatee marry with consent, is recoverable in Equity, notwithstanding the breach of the Condition, and where not.

Ans. 22.

1 *Ans.* 108.

2 *Ans.* 351.

She came to the age of One and twenty years, it not being usual for Ladies of her Quality to stay till One and twenty before they marry. And as to the pretence that this Condition was in terrorem, it was said, That it was a Limitation, and that it was by the Will limited over to the Defendant in case of the Lady Anne's Marriage without Consent, *pari passu* to her dying without Issue. And tho' the Civil Law may construe the Limitation in a Personality over in such Cases as this to be void, and to be but in terrorem: yet in this Court, in the Case of Inheritances, as this is, nay even in the Case of Personality, where it was limited over, as here, this Court hath not at any time avoided such Limitation over; the constant difference taken in this Court being betwixt a Condition to make the Devise void without limiting over to another, and the limiting over to another; in the first of which Cases the Court hath usually construed the Condition to be in terrorem only, because there is no other person appointed to take, as in the Case of Sir Henry Belasis now cited, (which you may see before, fol. 22.) But where it hath been limited over, it hath been always taken otherwise; as in the Case of Davis against Halton, Novemb. 1664. the matter here being 1000 l. part of what was given to the party who broke the Condition. And so, tho' it were for a Personality, the Limitation over is good.

The Master of the Rolls. There is no difference in this Case, whether it be a Condition or a Limitation, for the Penalty is the same in both. And this must be understood to be in terrorem; and the Infant had no notice of the Condition; and so decreed against the Defendant. And that the Plaintiff, the Lady, and the heirs of her Body, should hold and enjoy against him.

Appeal.
Lord Keeper.
Ch. Just. Keeling,
Ch. Just. Vaughan,
Ch. Baron Hale.

The Defendant appealed from this Order by a Petition, and prayed the Entry of it might be stayed; and it was so, and order'd to be reheard by the Lord Keeper, assisted with the Lord Chief Justice Keeling, Chief Justice Vaughan, and Chief Baron Hales, 22 April, 1670. At which hearing it was insisted by Serjeant Fountain for the Plaintiff, That this was a Penalty in terrorem, that the Daughter might not rashly marry; but she was then an Infant, without notice of it, and the Court do approve the Marriage.

Ser.

Serjeant Maynard for the Defendant. It's a Limitation, not a Condition: A Will would not pass Lands by the Common-Law, it's by the Statute; and that says the Will shall stand. And for Notice, the Law requires no Notice to be given, nor did the Earl the Devisor require any. And who should give notice? The Defendant is an Infant, and could we give notice? *Mence Testaturum ratum est.*

Mr. Solicitor Finch for the Defendant. There can be no Decree, for the subsequent Approbation works nothing, and was extorted by Compulsion. For when the Earls were first acquainted with the Marriage, they disallowed it, and the Estate divested out of the Lady by the Marriage without consent, and the subsequent Assent cannot revest it. The primary intention was in terrorem, to restrain the Lady from an imprudent disposal of her self; but the secondary intention was, that if she did marry without consent, she should lose the Lands. The Grandfather could not have settled it stronger than he hath: And that the Grandfather may impose such Condition on his Children, is not to be deny'd. And if this Court should relieve against it, it is to encourage Disobedience in Children to Parents. And this is a Case purely at Law, and the matter of Notice and other Circumstances are all to be considered at Law as well as here; and if not relievable there, it's the same here. And if Notice is necessary, as I conceive it is not, that is purely at Law; and possibly it may be found at one Tryal that there was not Notice, and at another it may be found there was Notice; and it being matter of Inheritance and Freehold, the Defendant ought to be at liberty to try it twice quociens.

Subsequent assent will not supply the want of consent precedent.

Serjeant Fountain. A Limitation may be at Law, and yet relievable here: As, if the Condition be to have the Consent in writing, and the Consent is had without writing, this Court will help in that Case. And be doubted whether a Father can so provide in his last Will, as that a Court of Equity shall have no Power over it; for it cannot be so provided by Agreement of Parties in Case of a Mortgage, that this Court shall not give Relief; and Equity is part of the Law of England. And there are Emergencies and Cases which a man cannot provide for: As, Suppose the Plaintiffs had sent to the parties for their Consent, and the Messenger never went, but said he did, and had their Consent, and upon this she had married, she should

A Condition may not be performed in all circumstances, and yet be relieved here.

Agreement of parties can't prevent a Court of Equity in its Jurisdiction.

Equity regards
the Substance, &
not the Ceremony.

should certainly be help'd in Equity. And the end of the Will is performed; he was to marry such person as the Earls should like of, and they have approved, and so the substance is performed; and whether it be a Limitation or Condition is equally penal; and a Limitation over of personal Legacies, is void by the Civil Law, I grant; but that in some Cases of a Limitation over there may be Equity, it clearly follows in this, upon the Circumstances of Infancy, and not Notice and Assent subsequent.

The Court would see Presidents; And then 30 May, 1670. upon perusal of all the Presidents, the whole Court agreed in one uniform Opinion to dismiss the Bill, and accordingly it was dismissed.

Chief Baron Hales argued thus:

1. It is to be considered whether this be a good Condition or Limitation?

2dly. Whether any Relief be to be given against it?

3dly. Whether upon the Circumstances it is relievable here?

1st. He conceived it a Limitation and Condition both in Law and Equity, because it's collateral to the Land; he may marry if he will; but if without consent there is a Penalty.

Estates governable
by the Common Law ought
not to be influenced
by another
Law.

2dly. It's a Condition, because it is to contain the party in that due Obedience which Law and Nature oblige her; and he should have applied to her Grandmother for her consent, tho' there had been no such Condition. And altho' in the Civil Law, in the Case of a meer Personalty, the Limitation over to void: yet this is a Devise of the Lands not governed by that Law. Estates governable by the Law of this Kingdom, without relation to another form, ought not to be influenced by another Law; and this being a good Condition, it cannot be in Law defeated; and there being a full breach of the Condition, as Law will not, Equity cannot help. And as to the Objection, If there may not be Relief against Breach of Conditions in Equity, there will be a great shatter in Decrees already made: this Case is not like the Case of a Mortgage, where the Condition is for payment of Money, because there if the Money be not paid at the day, there may be a compensation made by payment at another day with Damages.

3dly. Again,

3dly. Again, This Breach is not relievable in Equity, because it is a voluntary disposition throughout, both in equal gradu, as to the Settlement, and as to the Blood of him that made the Settlement. And it appears by the Will of the Earl of Newport that made the Settlement, That he did as really intend it should go over for marrying without Consent, as the Ladies dying without Issue. And he rests much on it, that there is no President of any Relief given in this Case; for upon view of all the Presidents, he doth not think any of them come to this Case; and it's not fit to go further than the Court hath gone already; for if they should, there would be no end, and it's fit to set bounds. And as to what was offered from the proof, that it was the Earl's intention that the Lady should have Newport House, and that therefore it was in terrorem; he said, That no collateral Averment to expound the Will ought to be admitted; for if there should, there would be no certainty in any Case. And as to the Earls approving the Marriage since, he said they were charitable therein; and tho' Equity will favour Infants, yet an Infant may be bound by Law to a performance of a Condition; and inasmuch as this Condition is annexed to an Act (Marriage) which she as an Infant might do, the Infancy will not help. And as to the point of Notice, I will not determine here whether Notice be requisite and necessary; for that is at Law, and want of it, if necessary, will abate there. I will not say what Equity may do in case of want of Notice; but that Fact is not settled whether Notice or no. It would be hard, because there is not full Notice proved, to conclude here is no Notice; and so would have the Bill dismiss'd.

The breach of a Condition annexed to a voluntary disposition, not relievable in Equity.

Tamen quare.

The two Cases of *Peyton & Shipdam* and *Cook & Tooke* here cited for Presidents, are otherwise.

No collateral Averment to be received to expound a Devise of Land.

Whether Notice be necessary to be given of a Condition annexed to an Estate to the person to whom the Estate is given.

Keeling agreed, and said, 'Tis fit to keep those Bonds which Parents impose to hold their Children at Obedience, straight, and not fit for a Court of Equity to relax them.

Vaughan. As to the Consent subsequent, that signifies nothing; for a man cannot be said to consent to a thing which is not capable of Consent; as, to say a man consents that his hair is of such a colour, is Nonsense, for that is not an Object of his consent; and after the Marriage their Consents signify no more in that Case.

The Lord Keeper declared, He was clear of Opinion that Equity ought not to interpose in this Case, and was

was glad to see that a Parent could settle his Estate, that it might be out of a Power of a Court of Equity; and so the Bill was dismissed.

Note, That upon Trial, and an Argument after this hearing in the King's Bench, it was adjudged that Notice was not necessary to be given.

The Presidents cited in this Case were, Sir Henry Belasis, fol. 22. Fleming and Walgrave, fol. 58. Wallis and Crimes, fol. 89. Escot and Escot, 7 Febr. 1653. Coke and Tookey, 24 May, 15 Car. 1. Peyton and Shipdam, Novemb. 1657. The two last Cases were, Whether Relief were given for the breach of a Condition on nonpayment at the day, on a voluntary Devise, there being no Damage but what might be made up by payment after with Damages?

The Lord Keeper.

Davy against Davy. December 11.

The Plaintiff was eldest Son by a second Venter, and the Defendant was eldest Son and Heir by the first Venter; and the Bill was, to be relieved for a Rent-charge of 200 l. per annum, of which there was half a year due.

The Bill did suggest, That the Defendant kept not any Stock upon the Ground, but converted it all to Tillage, so that the Plaintiff had not a sufficient Distress, and so was without Remedy save in Equity, and prayed a Decree against the Defendant for the Arrears and growing Payments.

The Defendant demurred for that the Lands only being charged with the Rent at Law, there was no Equity to charge the Defendant's Person.

But this Demurrer was over-ruled, it being laid in the Bill, That there was a legal defect in the Assurance, which ought to be made good in Equity, the Grant being on a good consideration.

The Defendant answered, and denied the converting the Premises always to Tillage, or that the same were not overt to a Distress; but said there had been divers times a Stock worth 250 l. upon them.

After

After Proofs published in the Cause, it was heard before the Lord Keeper, 20 Nov. 1667. And the only Equity there insisted on for the Complainant was, That the Defendant employed all the Lands to Tillage, so that the Plaintiff could not distrain, there being no Cattle kept on the Premises. But the Defendant did insist, That he did keep a Stock of Cattle thereon sometimes worth 250 l. at a time, and that the Plaintiff endeavoured to charge the Defendant's Person with the Rent, which was not liable at the Law. But the Plaintiff's Counsel replied, That tho' possibly he might have Remedy at Law, yet it was usual to settle Matters of this nature in Chancery.

A Rent which chargeth only the Land, not to be decreed in Equity against the Person.

Whereupon, and upon reading the Proofs in the Cause, the Court declared they would be attended with Presidents where Cases of this nature had been relieved, and then would give their Opinion. 8th Nov. 1668. the Court ordered the Cause to be set down again on the Presidents, which the Plaintiff was to deliver to the Defendant. One President was this: Seymour Boreman and Francis Year Plaintiffs, against John Year Esq; Defendant. The Bill was grounded upon an Agreement made upon the Marriage of John Year, the Father of the Plaintiff Francis, with Frances his Mother, and a Tripartite Deed 15 Car. 1. in pursuance thereof, whereby John the Father became seized in Tail, and after the death of Thomas his Father, covenants to levy a Fine, to the intent Elizabeth (Mother of Frances, his second Wife, after the death of Thomas and himself) and her Assigns should have during her Life out of the Premises 150 l. per annum, if John should have Heirs-male of his Body that should so long live; and to the Heirs-males of the Body of John by the said Elizabeth, another 150 l. per annum, during the Life of the said Elizabeth; and that the Heirs-males of the Body of John and Elizabeth have 200 l. per annum out of the Premises, with a Clause of Distress; and a Covenant to make further Assurance. A Fine was levied accordingly, August 1663. John the Father died in the life of Thomas his Father. Elizabeth sold her Right to the 150 l. limited to her self after the death of Thomas, to the Plaintiff Boreman, and in October before the Bill Thomas died, whereby the Plaintiffs became intitled to the several Rents, the Lands descending to the Defendant as Heir to his Grandfather, being eldest Son of John by a former Center, and he had all the Deeds,

Bowman or Boreman against Year.

20 Jan. 1660.

Confusion of
Bounds of Lands
out of which a
Rent-charge is-
sues proper mat-
ter for Relief in
Equity.

and refused to pay the Rents, pretending the Lands were not sufficient, and the Limitation in Law defective; and the Lands lying intermix'd with others, and Boundaries confused, the Plaintiffs could not distrain, and so prayed Relief here. And charged also, That the Defendant's Father agreed, that if the Lands were too small in value, or defective in Title, he would make both good. To have that done, and to discover the Buttals and Boundaries, and to have the Rents arrear and growing Rents paid, was the scope of the Bill.

The Defendant by Answer insisted, That the Plaintiffs proper Remedy was at Law, and that Boreman had not a good Title, because he had not any Attornment, nor ought appeared, nor any good Conveyance from Elizabeth, and justified the detainer of the Deeds.

On the first hearing, 25 Jan. 12 Car. 2. Ordered a Commission to go to set out the Lands, and Boreman's Title to be determined on the return of the Commission. The Commissioners certified that they had set out the Lands, the present Rents whereof were but 70 l. per annum, and that the Lands charged were 300 l. per annum; and then the Cause came again to be heard before the Lord Chancellor and the two Chief Justices, 12 Jan. 1660. And as to Boreman's Title as Assignee to Elizabeth, by which he claimed the Arrears from Thomas Year's death, during Elizabeth's life, the matter stood upon was, That he did not prove he had paid any Purchase-Money.

A Limitation to
Heirs-males taken
in Equity as a Li-
mitation to the
first Son.

The Court conceived that was not material, he claiming under Elizabeth, who was intitled by the Marriage-Agreement, and so capable of Relief.

A defective Limi-
tation in point of
Law supplied in
Equity.

And the next Point was as to the other Plaintiffs to 100 l. per annum during Elizabeth's life, and 300 l. after to him and the Heirs-males of his Body. Whereupon the Court declared, That though the Limitation of these Rents were defective in Law, so as the Plaintiff could have no Remedy at Law, yet by the true meaning of the Marriage-Agreement, the Plaintiff Francis is well described to take the Rent, and both the Plaintiffs well intitled, and ought to have Relief so far forth as the Lands and Rents reserved on the Lease, and the Lands as they shall come out of the Lease, shall be of value to make good the same; and that Boreman ought to be first paid; and decreed the same accordingly, and the Defendant to account for the Mesne Profits, &c. And for the future
the

the Rents reserved and Lands out of which the Rents and Profits are issuing, at the highest yearly value, not exceeding 200 l. per annum, after the Leases expire should be liable to the payment of those Rents to the Plaintiff Boreman during Elizabeth's life, and after 300 l. per annum to the Plaintiff Francis, according to the true meaning of the Deed.

The difference between the two Cases was,

First, In the principal Case the Rent was well limited to the Plaintiff in point of Law by the name of the first Son of the second Venter, and he may distrain, and having Seisin, may bring an Assize. But in Boreman's Case, neither himself had any Remedy at Law for want of Attornment, and by reason of intermixture with other Lands, nor had the other Plaintiff, by reason he was not Heir-male to his Father; but that Defendant was by a former Venter, so the Limitation was not good in Law. And observe in Boreman's Case the Lands only are made liable, not the Person.

Another President delivered by the Plaintiff to the Defendant, was 22 June, 1644. Elizabeth Ferris against Newby, where an Annuity being devised by Will, and by the same Will the same Lands devised to an half-brother of the Devisee of the Annuity, this being a Rent-Seck without Seisin, and no power of Distress, and the Devisee of the Lands having promised to pay it; the Court did decree the Devisee of the Lands to give Seisin of the Rent to the Devisee of the Annuity; which Case, as was conceived, was against the Plaintiff in the principal Case, it being in his power to have Seisin when he would. And the Court in this Case did not decree the Lands to be liable.

And now, upon further hearing of the principal Case, the Plaintiff's Counsel did not think fit to insist upon, or so much as to mention their Presidents, but stood only upon the defect of a Distress, and that the Arrears of the 200 l. per ann were now 100 l. and the Land but 200 l. per ann.

The Lord Keeper declared on the Debate of the principal Case, That unless there did appear a Fraud to hinder the Plaintiff of his Distress, he could not have Relief here; And that all he could do was to refer it to a Trial at Law, Whether there was any Fraud to hinder the Plaintiff of his Distress? And accordingly at the Plaintiff's desire did refer it to a Trial.

supra mentioned
noting that it is
not to be taken
from 803. Pl. 1092.
Lanc. 146. 1094.
1 Roll. Abr. 378.
Pl. 22.
4 Lam. 184.
Ant. 79.
Post. 185.

Seisin decreed of
a Rent-Seck.

Fraud to hinder a
Distress, where
tried.

The Lord Keeper.

Trevor against Perryor. December 14.

On a Demurrer.

The Plaintiff was an Executor to an Obliger, and the Bill was to have an Equity of Redemption, which descended to the Heir of the Obligor by his death, made Assets in Equity.

To this Bill it was demurred in Benner and Box's Case; and on debate the Lord Keeper inclined to think it all one with that Case.

Whether an Equity of Redemption in the Heir of the Mortgagor be Assets in Equity.

But for the Plaintiff it was insisted, That that Case was an hard Case to be established in a Court of Equity; and that this is a stronger Case, for here the Lands were once in the Obligor, and never absolutely put out of him, but conditionally by way of Pledge for Money: And the Equity of Redemption he had was as considerable as the Redemption, which was Assets at Law. So the Lord Keeper ordered to answer: but saved the benefit of the Demurrer to the hearing of the Cause,

*The Lord Keeper.
Justice Wyld.*

Hurtost Grove, against Banson and his Wife, and Thomas Grove. December 14.

Hurtost, the Plaintiff's Grandfather, possessed of a great Personal Estate, gave the Plaintiff 5000 l. and 500 l. to his Sister, Banson's Wife, and made the Defendant Thomas Grove his Executor, who had purchased the Manor of Beeren-Hall with part of the Testator's Money, and mortgaged it to Perryor, and forfeited it. Upon the Marriage of his Daughter to Banson, he agrees her Portion to be for Legacy, Interest, and what more he would give

give her 1000 l. and enters into a Statute to Banfon for the same, and then he grants the Equity of Redemption and the Reversion (for the Mortgage was but for a long term of years) to Banfon as a farther Security. The Bill was to be admitted to redeem the Mortgage, and to have the Legatees lose in proportion. And tho' Banfon had a Statute and Mortgage prout, whereby it was said his 1000 l. continued no longer a Legacy, but was as much a Debt to him, as if he had lent the Money; and he took it as so much Portion, or else he would not have married: Yet the Lord Keeper declared, That inasmuch as the Legacy was not paid, but only secured, he conceived it equitable for each Legatee to lose in proportion, there not being enough of Thomas Groves Estate to pay all, and would not admit Banfon to redeem, but the Plaintiff, for that his was the greater Debt; and so ordered that he should redeem, and Banfon should lose of his Wife's Portion in proportion with the Plaintiff. And in this case the Case of Pick and Vincner, 1639. by Advice of Civilians, was cited, where it was resolved, That an Executor was not bound to pay a Legacy, but on Security to refund, in case there should be a defect of Assets to pay Debts and Legacies. But that, as was said, was not applicable to the principal Case; for the Testator had left ample Assets, but Thomas Grove had wasted them, and was insolvent.

Legatees to abate in proportion where there is not enough to pay all.

An Executor not bound to pay a Legacy without Security to refund in case of defect of Assets.

Vide the Case of Pick and Vincner more largely in Grove & Banfon.

The Lord Keeper.

Higgon and others, against Syddal, Calamy, and others.
December 15.

On a P L E A.

The Case was this: Syddal granted a Rent-Charge of 300 l. per annum for 2000 l. to the Plaintiff, and after mortgaged the Premises for 1200 l. to Calamy. Then those that have Calamy's Interest, he being dead, buy in a Judgment precedent to the Grant of the Rent-Charge. The Plaintiff exhibits his Bill to discover what Estate the Defendant claims, and chargeth that Calamy had notice of the Plaintiff's Rent before his Mortgage.

2 Vent. 137, 338.

Hard. 173.

2 Chanc. Cases, 208.

1 Chanc. Cases 202,

162, 163, 36, 201.

2 Chanc. Cases 20,

35, 213.

The

A Mortgagee without notice of a precedent Incumbrance, buys an Incumbrance precedent to that, he shall not be impeach'd in Equity, but on payment of all which is due to him on both Estates.

The Defendants plead the Mortgage to Calamy, and that afterwards hearing of precedent Incumbrances, they bought in a legal Title precedent to the Plaintiff's, and offer that if the Plaintiff will pay all due on the Mortgage, and on their new acquired Title, to assign all to him. But if he will not, they stand upon it they ought not to discover what that Estate is they have bought in, nor ought their Title to be drawn under Examination in Equity; and by way of Answer denied that to their knowledge or belief Mr. Calamy had any Notice of the Rent-Charge when he lent the 1200 l. And on debate the Plea was allowed as good.

*The Lord Keeper.
Justice Wyld.*

William Style by Original Bill, against William Martin and Elizabeth his Wife, Relict and Administratrix of Richard Bosvile Esq; and Robert Bosvile, Son and Heir of the said Richard, by Guardian. Decemb. 16.

The Bill was an Original Bill to set aside a Decree in 1664. obtained by the Defendant on a Bill of Reviver (to which the now Plaintiff is no party) against John Style, Heir of Sir Humphrey Style, and others, as obtained by Fraud. The Case was thus:

Sir Humphrey Style's Lady (Mother of the said Richard Bosvile) had by his request mortgaged a Manor of hers for 3000 l. borrowed by Sir Humphrey 8 Novemb. 8 Car. 1. And Sir Humphrey had agreed with his Lady, That if he did not pay off that 3000 l. that then his Lands in Kent should stand obliged to pay 1500 l. of the 3000 l. for the ease and benefit of the said Lady and her Heirs. And 15 Novemb. 8 Car. 1. he conveyed his Kentish Lands to Trustees, which the Defendants say was for that purpose, but no such express Trust. Trin. 1641. the Lady Bosvile being dead, Richard Bosvile her Son and Heir exhibited his Bill against Sir Humphrey and the Trustees of the Kentish Lands, to have the benefit of this Agreement. And in

Trin.

Trin. 1642. two Witnesses were examined to the Proof of the Agreement against Sir Humphrey Style, and that the Conveyance of the Kentish Lands was on that Trust. The Wars coming on, there was a Rest, and no farther Proceedings till 1663. In 1665. Richard Bosvile, who was a Recusant, died, his Heir then and yet an Infant. Michaelmas 1661. Martin & Uxor, and the other Defendant, the Infant, brought a Bill of Reverter against John Style, the Heir of Sir Humphrey, and the Heir of the surviving Trustee. And in 1664. after the Answer of John Style, who by Answer said he was willing the Plaintiffs in the Bill of Reverter may have their Money, if he may have the rest of the Lands, and Replication and farther Proof taken and published, it was decreed, That the Plaintiffs in the Bill of Reverter should hold the Lands against John Style and his Heirs, and all claiming under Sir Humphrey Style since the first Bill, until the 1500 l. with Costs and Interest were paid off, of which Bill of Reverter the now Plaintiff had due notice given him, and he might, if he had pleased, come in by a Cross-Bill, &c. before the Decree. The now Plaintiff made Title by an Intail of Sir Humphrey Style on him in 1638. precedent to the Original Bill, so that Title was not bound by the Decree. But that Settlement being in truth revoked in 1643. he made another Title by the Will of Sir Humphrey Style in 1658. And for the now Plaintiff it was insisted, That there was a Collusion in getting the Decree, the Defendant John Style admitting it by Answer to it on the matter, and the now Plaintiff, who was Terr-tenant, no party to it. And the Report of the Master who had computed the 1500 l. and Interest to amount to 3600 l. was confirmed without any defence by John Style. And the Rule for binding Titles pendente lite, (which is the Rule of the Practice at this day) was the Lord Bacon's Rule, and that Rule is, That lis pendens binds, if it be in full Prosecution; but here was above twenty years Cessation, and the Plaintiff had in that time bought in Incumbrances, and improved the Lands, and the notice given the Plaintiff of the Bill of Reverter was too late, Issue being joined, so that he could not come in. And it's said, Where Judgment is obtained against the Land, and the Terr-tenant is no party, a Writ of Deceit lies for the Terr-tenant; and so in a parity of Reason this Bill was maintainable for the now Complainant. Spencer's Case, 9th Report, was cited. And

it

it was further said for the Plaintiff, That there was no such Agreement between Sir Humphrey Style and his Lady as the Decree was grounded upon.

For the Defendant it was said, That the Plaintiff was stopt to say there was such an Agreement by Decree.

A Stranger being bound by a Decree gotten by Fraud, may falsifie it.

All that come in *pendente lite* are bound by a Decree.

Notice given a Stranger of a Bill of Reviver necessary, it's improper to make him a Party, not being in privy.

Lord Keeper. A Stranger may falsifie at the Common-Law; and if the Decree be by Fraud, the Plaintiff may then be admitted to falsifie the Agreement. But it is not form, but the substance of a Decree, that all be bound that come in *pendente lite*.

But the Defendant's Counsel insisted, That there was no Fraud; for the main Witnesses which were to the Agreement were examined in Sir Humphrey Style's life-time. Those which were examined after, were to prove the payment of the 3000 l. the Mortgage-Money, which was paid afterwards; and Notice was given to the now Plaintiff before any Examination of the Bill of Reviver, and could go no otherwise, unless they would have betrayed the Infant; for if he had gone by Original Bill, they must have lost the Witnesses examined on the first Bill.

Lord Keeper. The War and Infancy excuses the Laches, and the Witnesses to the main were examined in Sir Humphrey's life; and so the pretence of the Plaintiff's Improvement, and taking off Incumbrances, nothing of that in the Bill, but in the Replication: And so dismissed the Bill.

Sherman against Withers. December 11.

On a P L E A.

Exception in the Statute of Limitation as to Merchants Accounts extends not to Inland-Merchants.

The Plaintiff was an Inland-Merchant, and the Defendant his Factor; And the Bill was for an Account of fourteen years standing.

To all but what was within six years before the Bill the Defendant pleaded the Statute for Limitation of Personal Actions, 21 Jac. 16. c. And upon debate of the Plea, the Lord Keeper conceived the Exception in the Statute as to the Merchants Accounts, did not extend to this Case, but only to Merchants trading beyond Sea.

The

The Lord Keeper.

Sir Jeffery Palmer, the King's Attorney-General, on the behalf of Woolrich, a Lunatick, against Woolrich.
Mich. 1669.

A Bill brought by the Attorney-General in the nature of an Information, for the benefit of a Lunatick, as in the Case of Jerome Smith, fol. 112.

The Defendant demurred, for that the Lunatick was no party, which was ruled a good Demurrer; the Lord Keeper declaring it was as needful to make the Lunatick a party as an Infant, where a Suit was on his behalf; but in the case of an Ideot it must be otherwise; but a Lunatick may recover his Understanding, and then he is to have his Estate in his own disposing.

Where a Lunatick must be a Party to a Suit for his own benefit. *Aliter* in case of an Ideot.

But observe the difference between this Case and that of Smith's.

Smith's Case was, to be relieved against an Act done by the Lunatick in assigning a Debt, because he was a Lunatick at that time; so that if he had been a party, it had been to stultify himself, which the Law does not admit. Vide Beverly's Case, 4 Rep. And quare how it can be done by Information on his behalf?

But in Beverly's Case the King hath the custody of his Person, of his Lands, and his Goods, so as to provide for the Ideot, to prevent an Alienation; and therefore by Scire facias may avoid a Feoffment and other disposition made by the Ideot. But the Book says, That that is not a breach of the Rule, that a Man cannot be admitted to stultify himself, because the Ideot is not Party to the Record in a Scire facias. And in that Case it is the same thing, and the Writ the same as to the Alienation of non compos mentis, or a Lunatick, or of an Ideot, and the King shall protect those that cannot protect themselves.

And the Alienation of a non compos mentis, as well as of an Ideot, being found by Office shall be avoided. Tamen quare. And upon that ground I suppose it was those Bills were grounded; for it was declared by the Court, that those Bills were proper to be brought by the Attorney. And in Woolrich's Case the Bill was, to be relieved upon a

Where a Lunatick shall be a party to an Information on his behalf, and where not.

Marriage-Agreement, for the benefit of the Lunatick, before he was a Lunatick; so that he being a party to that Bill, did not tend to stultifie himself, and may be the reason why he should be a party to it: And the other Bill tending to stultifie himself, may be a reason why he should not be a party to it.

*The Master of the Rolls, in the absence of
the Lord Keeper.*

Cadwallader Jones Esq; against John Lenthal and his
Lady. Mich 1669.

1 Mod. 141, 305.
1 Roll. Abr. 374. N.
Pl. 2.

Relief for a Debt
which the Plain-
tiff had sworn was
satisfied before
Answer.

The Bill was, to be relieved for a Debt owing by Bond from Sir James Stonchouse, to whom the Defendant the Lady was his Executrix; which Debt and Bond the Plaintiff in his Answer to a former Bill had sworn was fully satisfied to him, but that was to avoid a Sequestration of the Debt, as was alledged. And the Master of the Rolls, tho' that Answer was set forth in the Defendant's Answer in this Cause, would not suffer the Answer to be read against the Plaintiff, and so decreed the Defendants to satisfy the Debt.

DE
Term. Sanct. Hill.

Anno Regis 21 & 22 Car. II.

IN
CANCELLARIA.

*The Lord Keeper.
Justice Moreton.*

On a Demurrer.

The Cause had been formerly heard in the Exchequer, where two several Trials had been directed, Will or no Will? and in both a Verdict for the Plaintiff. Yet the Chief Baron had dismissed the Bill there, but without Prejudice in Law or Equity. And now by an Original Bill the Plaintiff hath sought Relief here for those Matters he sought Relief in the Exchequer, and to examine Witnesses in order thereunto, in perpetuam rei memoriam.

The Defendants pleaded the Examination and Dismissal in the Exchequer, and that there ought not to be a new Examination, the Matter having been there full in Issue.

Dismissal of a Cause without prejudice in Law or Equity, how to be understood.

Matters formerly examined in the Exchequer, may be new examined in Chancery.

On the first hearing of this Demurrer the Court gave time to search for Presidents, where after a Cause heard upon the Merits, and dismissed in the Exchequer, a new Bill had been admitted here: And none being to be found, now upon farther hearing of the Demurrer, it was for the Plaintiff insisted, That this was a special Dismissal, it being without Prejudice either in Law or Equity; which Words must be considered to signifie something; but they did not signifie any thing, unless it were meant the Dismissal should not hinder the Plaintiff from seeking his Relief in any other Court of Law or Equity. And so the Court did conceive, and ordered that the Plaintiff might examine any Witnesses that were not examined in the Exchequer; and that as to the Matters examined unto there, the Plaintiff might examine the same Witnesses de bene esse; and how far those de bene esse should be used, the Court would farther consider.

The Master of the Rolls.

Bridget Dennis, by Sir Alexander Frazer her Committee, against Sir Thomas Badd, Frances Dennis his Daughter, and others. January 31.

The Case of Sir Thomas Badd was, That he was Guardian to Edward Dennis, (whose Sister and Heir the Plaintiff is) and at fifteen years of age married him to the Defendant Frances, his Daughter. Sir Robert Dillington had a Mortgage of 200 l. of part of the Infant's Estate, which Mortgage Sir Thomas Badd paid off, and took the same assigned to other persons. The Infant after, at seventeen years of age, made his Will, and the Defendant Frances his Wife Executrix. The Will was, That tho' Sir Thomas Badd had paid off the Mortgage with the Infant's own Money, yet he now pretends it was not for the benefit of the Infant, but that he paid it with his own Money; and for what Money he had of the Infant's, he was accountable to his own Daughter the Executrix, and so would leave the whole Mortgage-money still on the Mortgage-Lands, which belong to the Plaintiff as Sister and Heir to the Infant.

The

The Defendant Sir Thomas Badd by Answer said, That the Money he had paid Sir Rob. Dillington was his own Money, and that he had not near enough of the Infant's to pay the same; and that if he had had enough of the Infant's Money, yet he could not justify the disposing of it.

It was proved, That when Sir Thomas Badd paid off the Mortgage, he called in about 100l. of the Infant's Money, and that that was applied that way.

And in this Case the Master of the Rolls declared, That Sir Thomas Badd ought to imploy what he had of the Estate of the Infant, as far as it would go, to pay his Debts, and did decree a Redemption of the Mortgage, and that Sir Thomas Badd should account; and that what he had of the Infant's in his hands when the Mortgage was paid off, should be applied in discount of Mortgage-Money, and upon payment of what was more due to the Plaintiff, to redeem.

An Infant's Estate in his Guardian's hands ought to be applied to pay his Debts.

The Lord Keeper.

Sir Jeffery Palmer, the King's Attorney-General, on the behalf of the King and Trinity-College in Cambridge, against George Newman Esq; Febr. 10.

The Information suggests, That S. Newman was seized in Fee of the Lands in question, and possessed of Books and Goods, and out of a pious intent to provide for Maintenance of Poor Scholars in that College, by his Will in Writing devised to the Master and Fellows of that College, the Lands in the Information mentioned, and all his Moneys, Goods, &c. and appointed the Premises to be employed for buying Lands for Maintenance of Scholars in the said College, &c. with this Clause, That if any by Cavillation concerning the Law of Maintenance should go about to hinder this Bequest, or if any of his Bequest might not be suffered to go to the College, then the Defendant should enjoy all his Lands, Goods, &c. That by the Will the Premises are to be established with the College, but the Defendant combines with others unknown, either Lords of whom the Lands are holden, or Heirs at Law, and pretends that by the Statute of Mortmain

main the Devise is ineffectual, and so raiseth Cavills to defeat the Charity, and so has got the Possession of the Lands and Goods, and refuseth to let the Master and Fellows have them; That if by the Statute of Mortmain the said Charity be avoidable, yet by other Laws for establishing of Charitable Uses, and according to Equity, the Charitable Use ought to be made good. Wherefore, and inasmuch as the Preservation of Charitable Uses is of Publick Interest and Concern unto his Majesty and the College, and in respect of the Statute of Mortmain and Cavillation aforesaid, they have no Remedy, by reason of the latter Clause of the Will, to be relieved in the Premises, they exhibited this Bill.

The Defendant answered, and confessed the Will, &c.

The King as *Pater Patriæ* may inform for any publick Benefit. Statute of Charitable Uses.

And upon the Hearing it was declared by the Court, That the King as *Pater Patriæ* may inform for any Publick Benefit for Charitable Uses before the Statute of 30 Eliz. for Charitable Uses. But it was doubted the Court could not by Will take notice of that Statute, so as to grant a Relief according to that Statute upon a Bill, but that the Course prescribed by that Statute by Commission of Charitable Uses, must be observed in Cases relievable by that Statute. But no positive Opinion was delivered, for the Defendant consented to a Decree, and so what was done was by his Agreement, and not the Judgment of the Court.

DE
Termino Paschæ.

Anno Regis 22 Car. II.

IN

CANCELLARIA.

Wilmer and his Wife, against William Kendrick and
Jo. Vylet. May 17.

On a Demurrer.

William Kendrick seized in Fee of the Lands in question worth 90 l. per annum, and of other Lands, in all worth 100 l. per annum, by Indenture 23 April, 17 Car. 1. conveys the Lands in question to the use of Thomas his eldest Son for Life, the Remainder to Trustees for 99 years, for the benefit of Martha the Wife of Thomas for a Joynture; the Remainder of those and all other the Lands (of which by that Settlement Thomas was Tenant for life) after William's death, to the first Son of Thomas in Tail; Thomas has Issue Martha the Plaintiff's Wife, and another Daughter, and the Defendant Kendrick, his only Son. And by the Settlement there was a Power given to Thomas at any time during his life by any Writing to convey or appoint all or any of the Lands in question, being but 90 l. per annum, to any future Wife that Thomas should marry, for a Joynture, or to any Child or younger Children of Thomas, so as that Conveyance or Appointment be made

Touching a defective execution of a Power.

made to commence after the death of Martha (Thomas his Wife) for Life or Lives only of such Child or Children, and for their Preferment: Thomas having no other way to provide for his Daughters younger Children, 5 May. 1657. for love, &c. to them, and for provision of Portions for them, grants, bargains and sells the Lands in question to the Defendant Vylet, Habendum to him and his Assigns for the Lives of the Plaintiff Martha and her Sister, and for their only Use and Benefit, to remain from the death of Thomas Kendrick and Martha his Wife.

The Plaintiffs by their Bill suggest, That the Plaintiff Martha had no Provision but this, and that her Father did look upon it that he had well pursued his Power in the Grant to Vylet, or else that he would have taken the Word of the other Lands of greater value, which he knew were by the Settlement *supra* to come to the Defendant, and complained that the Defendant taking advantage that the Power was not literally pursued, did stand upon it, whereas it was in substance pursued, and the Estate granted to Vylet was less than by the Power Thomas had Power to grant; for by the Power he was to grant to commence on the death of Martha his Wife only, and he made it to commence on the death of himself and Martha, which was less than he had power to do; and the mistake did happen by reason that in the Settlement the Lands were limited to Thomas for Life, the Remainder in Trust for a Joynture for Martha.

A defective Execution of a Power raised by a voluntary Conveyance, without help in Equity.

And it was charged by the Bill, That in Equity the mistake and defect ought to be help'd, the younger Children being otherwise utterly unprovided for, and so to be relieved was the intent of the Bill.

To which the Defendant Kendrick demurred, for that the Deed of Settlement, and Deed to Vylet was void in Law; and being defective in the Execution of the Power, it ought not to be supplied in Equity. In the arguing of which Demurrer it was insisted, That both the Conveyances being voluntary, the Case was the same here as at Law, and no reason to help here against Law at all. And it was said, That if such defects should be supplied in Equity, it would be in vain to employ men of skill in drawing Conveyances and Settlements, but every unskillful man might do it as well. But if it had been a consideration of Money, it was admitted it might be otherwise.

wife. And it was farther insisted, That it did not seem to be a mistake in the Case, but done designedly; for if the Estate had been to commence upon the death of Martha, Thomas's Wife, then Thomas himself had lost his own Estate for life after Martha.

The Court was all of Opinion, That the Law being *Vide the Case of* against the Plaintiff (as it was admitted it was) *Equi- Parvey & Bowen,* ty could not help the Plaintiff. Yet they did mediate *f. 22.* with the Defendant to pay the Plaintiff Martha 20 l. for her life.

And the Cause having been formerly argued on the Demurrer, and a day given to the Plaintiff to produce Presidents where in like Case the Court had relieved: the Plaintiff produced a President, 6 July, 40 Eliz. Prince *Prince & his Wife* and his Wife Plaintiff against Green Defendant, where *against Green.* in effect the Case was thus: The Father seized in Fee of a great Estate, by Covenant to stand seized, settles the same to himself for life, the Remainder to his eldest Son, with Power to himself to lease a small part for forty years, who accordingly made a Lease for the benefit of a younger Child, which came by Assignment to the Plaintiff, which the Defendant, the eldest Son, would avoid at Law, the Power not being well raised by the Covenant to stand seized. But it appearing to the Court the eldest Son was greatly advanced by the Father, and that the Conveyance, which was by Covenant, was intended to be by Liberty, which he was advised would be as well by Covenant, the Court did decree the Plaintiff should hold until the Defendant evicted him by Law, and did decree the Defendant to admit the Power to make the Lease good in Law, if he did not prove an Intail paramount the Settlement, as he pretended.

A power to lease raised by a Covenant to stand seized, is not good.

4 Leon. 8.

2 Fent. 350.

1 Levinz 238.

Ans. 104.

Hard. 204.

2 Chanc. Cases 68, 69.

A defective Power made good in Equity.

*The Lord Keeper.
Chief Baron Hales.
Justice Rainsford.*

Elizabeth March, Richard Chaworth and Henry Malory,
Executors of Jane Duppa, against John Lee Senior and
John Lee Junior. May 30.

Mortgage.

*Vent. Rep. 2 part 337,
338.
Hardr. 173.
2 Chanc. Cases 20,
35, 208, 213.
1 Chanc. Cases 36,
201.*

The Cause coming to be heard, and argued on a Plea before the Lord Keeper, he directed a Case to be stated, and then would farther consider of it. And now the Case being stated, it was thus:

Trin. 1669. The Plaintiffs by their Bill set forth, That the nineteenth of January, 1662. Henry English, by Indenture and Fine (wherein the Wife joined) conveyed to the Plaintiffs Sir Richard Chaworth and Henry Malory, and their Heirs, the Manor of Monfield in the County of Sussex, to the use of Mistress Duppa for five hundred years, as a Mortgage for the Security of 4000 l. payable the fourth of March, 1664. with Interest in the mean time. That on the fourth of March, 1664. Mr. English mortgaged to Mistress Duppa the Manor of Wigfel in the County of Sussex, for five hundred years, for Security of 3000 l. more, payable the fifth of June after, with Interest; and covenanted in both Deeds, that the Premises were free from Incumbrances. 6 August, 1664. Mr. English acknowledged to Mistress Duppa a Recognizance in this Court of 2000 l. for payment of 1000 l. and Interest. The 7th of December after the 21st of October, 1665. (the Mortgages and Recognizances being forfeited) Mistress Duppa died before payment, having made her Will, and the Plaintiffs her Executors, who proved the same. Trinity Term, 1667. the Plaintiffs having brought several Ejectments, exhibited their Bill here against Mr. English and his Wife, That Mr. English might discover Incumbrances, and redeem by a day, or that his Equity of Redemption might be barred. Whereunto Mr. English and his Lady, after they had stood in a Contempt to a Commission of Rebellion, put in their Answer, but did not discover

discover any Incumbrances. Michaelmas-Term, 1667: Mr. English suffered Judgment in Ejectment at the Plaintiffs Suit, with a Cesset executio till May after. 18 May, 1668. the Cesset executio being expired, Mr. English, notwithstanding any Arguments the Plaintiffs Counsel could make, obtained an Order of this Court for stay of the Plaintiffs Proceedings at Law upon the Judgment in Ejectment till hearing, and another Order. 5 June, 1668. the Cause coming to be heard, the Court decreed that Mr. English should pay what was due to the Plaintiffs in a twelvemonth, or in default, the Plaintiffs should enjoy the premises discharged of all Equity of Redemption, against him, and all claiming under him. 26 Novemb. 1668. the Master to whom it was referred to take the Account, reported 8530l. 14s. payable to the Plaintiffs the first of June, 1669. 5 Febr. 1668. the Report was decreed, and the Decree thereupon signed and inrolled.

The Bill farther chargeth, That the Defendants designing to elude the said Decree, and defeat the Plaintiffs of the Benefit thereof, and of their Judgment in Ejectment, pretended that Mr. English had mortgaged to them in June 1665. in Fee, the Manor of Wigfel, for the Security of 2000 l. payable the twenty seventh day of June, 1666. which for nonpayment was become forfeited. The Defendants having had notice, and being acquainted with the Contents of the Plaintiffs Bill, and proceedings thereupon against Mr. English, and their Securities and Titles to the premises, about a week before the same came to hearing, exhibited their Bill here against Mr. English and the Plaintiffs to discover the reality of their Securities, and what was due thereupon, and prayed Relief therein upon the Title of their Mortgage. 30 Octob. the Plaintiff moved the Court again, which was between the times of the Decretal Order, and pending the Reference to the Master, upon an Affidavit that Mr. Bazel and several others had Incumbrances on the premises precedent to the Plaintiffs, to discharge the Order of the eighteenth of May last, whereby their proceedings at Law for the Recovery of the Possession of the premises had been stayed, and that they might be at liberty to proceed upon their Judgment in Ejectment to recover the Possession, which the Court however thought not fit to grant, but continued the former Order. That the Lees by means thereof ceased the prosecution of their Suit in this Court against the Plaintiffs, and while the

Plaintiffs were tied up by the Order of this Court from getting Possession, bought in a Mortgage made in 1649. by Mr. English to Mr. Burrel of part of Wigfel for 1000 l. and a Statute in 1656. acknowledged by Mr. English to Mr. Burrel of 800 l. for payment of 400 l. and have extended the Statute on both the Mortgages at not above the third part of the value, and by virtue thereof intend to evict the Possession, and to pay themselves as well the 1000 l. and Interest, as the 800 l. and 1000 l. and Interest, before the Plaintiffs shall have any fruit of their Decree; and that the Defendants ought, and that the Plaintiffs have offered them upon their payment to them the 8530 l. 14 s. and Interest, to assign their Securities; or else that the Defendants would accept what is due upon the Statute and Mortgage to Burrel, and thereupon assign them to the Plaintiffs; and yet they refuse to do it.

And so to be relieved in the Premises is the Prayer of the Bill.

Mich. 1669. The Plea and Answer of John Lee Senior, with the Answer of John Lee Junior.

The Defendant, John Lee the elder, to so much of the Bill as seeks Relief concerning the Mortgage of Wigfel, by setting aside or prejudicing any Title he or the other Defendant hath, or for discovery thereof until he be satisfied the Money in his Plea mentioned, for Plea saith, That about the one and twentieth of June, 1667. the said English affirmed that he was seized in Fee of the Mound of Wigfel free of Incumbrances; and the Defendant finding him in possession, and believing that he was so seized, and knowing nothing to the contrary, in consideration of 2000 l. paid by him, took a Conveyance of the Inheritance in Fee-simple thereof from Mr. English, in his and the other Defendants Names, for the Security of 2000 l. payable the twenty ninth of June, 1668. whereof no part is paid, but the Estate absolute. That the Defendant at the time of the Conveyance or before, had no notice of the Plaintiffs Securities, or any of them; but long after hearing that Mr. English had incumbered the Premises with the Plaintiffs Securities, and by a Prior Mortgage to Mr. Burrel for 500 l. for securing 1000 l. which was foreclosed in November 1649. had incumbered part of Wigfel,

Wigfel, and in November 1655. had acknowledged a Statute to Mr. Burrel of 800 l. for payment of 400 l. which was also forfeited, did by Advice of his Council for securing the Premises convey to him and the other Defendant, for 1090 l. by him paid, purchase in Mr. Burrel's Mortgage, and agree with him to extend the Premises and for 430 l. to assign the same as the Defendant should direct. That the Statute was extended, and the Defendant paid Burrel 430 l. who assigned the extended Premises as the Defendant did direct. That the Defendant made the Purchase of Burrel principally to secure his Title, and to protect from Incumbrances the Premises conveyed to him and the other Defendant, and to reimburse the several Sums of Money by him paid, with Damages, or at least so much as shall be really due on the said Burrel's Mortgage and Statute, and Demands Judgment. And by Answer saith, That after this Purchase, and not before, he heard of the Plaintiffs Incumbrances, and heard also of Burrel's Mortgage and Statute; and that before he bought Burrel's Mortgage and Statute, he had notice of some Proceedings by the Plaintiffs had in this Court against Mr. English touching the Premises, but were no parties thereto; but what the same were, referred to Records there, and Proceedings at Law, and thereupon by advice of Council he did purchase the said Mortgage, Lease and Extent, Novemb. 27. 1668. That the Agreement for the Mortgage and Statute with Burrel was intire, tho' perfected with several Instruments, and the Consideration mentioned to be several, and Burrel refused to extend the Statute and assign the Extent, unless the Defendant paid him what was due on his Mortgage and Statute. The Defendant submits, That if the Plaintiffs will let him enjoy his Purchase Lands free from Incumbrances, to pay him the Purchase Money and Damages, and will pay him what he paid Burrel, with Damages and Costs, if he will accept it. The rest of his Answer is to the effect of his Plea.

John Lee Junior, his Answer.

By his Answer saith, That he claims nothing in the Premises to his own use, his Name being only used in Trust for the other Defendant, and had no notice of the Plaintiffs Title a long time after the Defendants Purchase, and refers in all things to the Plea and Answer of the other Defendant.

In

In this Case these Queries were made on the Plaintiffs part.

Whether a Statute bought in by a Mortgagee ought to be used as to Lands not in his Mortgage.

I. Whether upon the paying to the Defendants what is due to them upon the Mortgage and Statute to *Burrel*, the Plaintiffs ought not to have the same assigned to them? And if not, Whether the Statute, being but an Incumbrance, and no Estate, ought to be made use of as to the Manor of *Monfield* by the Defendants, wherein the Defendants have no Estate, and the Title the Defendants would protect is but a Mortgage or Incumbrance, and not to protect the Title of an absolute Estate?

Whether a Mortgagee shall protect his Mortgage by Incumbrances bought in against a Title he had notice of before, and under which the party was then in possession.

II. Whether the Plaintiffs having Judgment in Ejectment for the Possession long before the Defendants bought in *Burrel's* Mortgage and Statute, and after the Defendants had notice of the Plaintiffs Title and Proceedings in this Court, and notwithstanding their Endeavours to the contrary, being stayed by the Order of this Court from recovering the actual Possession, they might be looked on as actually in Possession? And in that case, Whether shall the Defendant make any use of *Burrel's* Mortgage and Statute bought in pending the Injunction, and after the Decree against *English*, other than to reimburse themselves the Money thereon due? And if not,

III. Whether by the Defendants getting in the Statute, in manner as is before expressed, he shall be at liberty to make use of it only against *Monfield* in the Plaintiffs hands, and so force them to pay off the Penalty of the Statute, or clear the same, which *Burrel* himself could not have done, but all the Lands must have been charged with the Satisfaction of *Burrel's* Statute, as well those in the Defendants hands as the Plaintiffs?

And these Queries were made on the Defendants part.

A Mortgagee may protect himself by getting in an old Incumbrance, tho' nothing be due on it.

I. Whether the Defendant *Lee*, being a real Purchaser, *bona fide*, of *Wigsel* for 2000 l. from *English* then in possession, without any notice of any of the Plaintiffs Incumbrances preceding to his Purchase, might not purchase in the Mortgage Lease of *Wigsel* made by *English* to *Burrel*, and the Extent of *Burrel's* Statute preceding to the Plaintiffs Incumbrances, both forfeited in point of Law, and protect his Purchase

Purchase of *Wigfel* till the 2000*l.* and Interest be paid? And whether there is any Equity against him, for the Plaintiff any way to weaken his legal Securities for enjoying his Purchase till the 2000*l.* and Interest be paid, admitting that nothing had been due on *Burrel's* Mortgage or Statute in Equity, and the Defendant had paid nothing for purchasing in that Mortgage and Extent?

II. Whether the Defendants having paid to *Burrel* 1520*l.* Whether a Mortgagee buying in restrained from taking the benefit of the Law by the said an Incumbrance Mortgage, Lease, and Extent, so far upon any the Lands of that chargeth other Lands also, *English*, in the hands of the Plaintiff or any others, to recover shall be restrain'd what he really paid to purchase in the same, so as they after from his legal such Satisfaction make no other use of the said *Burrel's* Mortgage or Extent, than only to protect his own Purchase Lands course to reimburse himself the Money paid for that Incumbrance, till the 2000*l.* and Damages be satisfied? so as he use it only to protect his Mortgage.

III. Whether the Defendant having paid his aforesaid Purchase for a valuable Consideration, without Notice of the Plaintiffs Incumbrances, and by Answer offers to take the Mortgage-Money and Damages, and the Money paid for *Burrel's* Mortgage, and Extent, and Damages and Costs, and quit the whole, or else to enjoy the Mortgage free from Incumbrances, and be paid what he paid *Burrel*, with Damages and Costs, and make no further use of *Burrel's* Extent, than only to protect his purchased Lands from Incumbrances: that a Court of Equity shall give any further Relief against him to his Prejudice, being a Purchaser, without Notice; and if any, what Relief?

IV. Whether the Defendants, who are no Parties to, nor at all concerned in the former Suits between the Plaintiffs and *English*, or concerned in any of the Orders or Proceedings therein, shall be in any sort affected with, or prejudiced by any of those Orders?

The Court unanimously agreed, That the Defendant ought not in any sort be impeached in Equity as to *Wigfel*, but might keep his Statute and Security on foot to protect his Mortgage; and that the Proceedings in Chancery against *English* by the Plaintiffs, did not at all influence this

2 Vent. 338, 339.
Hardresf. 136.
2 Chan. Cases 213.

this Case. But as to the Manor of Monfield, in which the Defendants had no Estate before they bought in the Statute, the Court inclined that so much of Wigfel as was not in Burrel's Mortgage (for he could not extend on himself) Monfield should be accounted for at the real value, in order to discharge Monfield of the Extent, but not so as to prejudice the Extent in Course of Law as to Wigfel: but that the Statute ought to protect Wigfel as far as by any Course of Law it might.

On the Argument of this Case was produced Higgon against Udal, and Medleton against Shelleh, 19 June, Car. 1. for Presidents.

On the hearing of this Case, which was a parallel Case, the Court would be satisfied there by Presidents before they would give any Relief against Purchasers in of Incumbrances to protect a real Title, and the Cause went no further here. But the Plaintiff, as the Chief Baron now said, brought his Bill in the Exchequer afterwards, and was there dismissed.

And in the principal Case the Plea was allowed.

DE

Term. Sanct. Trin.

Anno Regis 22 Car. II.

IN

CANCELLARIA.

*The Lord Keeper-
The Master of the Rolls.*

Hurst against Goddard. June 7.

THE Case was thus. There was a Sum of Things in Action provided by a Settlement of Lands to on assignable in be raised for Daughters Portions; one of the Equity, and how Daughters married and dies before her Portion paid; her Husband takes Administration to her, and assigns all his Interest in that Portion to his Son by a former Wife. The Son by this Title (the Father being dead) sued in Equity for this Money. *Post 232. 2 Chanc. Cases 7, 27.*

It was insisted for the Defendants, That though things in action might be assigned here on a consideration by the party that had the Interest, and were recoverable here by the Assignee; and that a Release afterwards by the Assignor, unless it were without Notice and on consideration to him to whom the Release was, would not hurt the Assignee; yet here the Assignment being by an Administrator,

Z

and

and not the person that had it in his own right, this had never been good, for there might be a Creditor to satisfy the Intestate, &c.

The Lord Keeper did think there was a considerable difference between the assignment of the Party and of the Administrator, where the Administrator was a Stranger, or had not Right before, and no colour of Right but merely by the Administration. But here in this Case the Administration was pro forma only, for here he had a Right to the Money, as a Portion or Provision for his Wife, and every Man hath not ready money to give Daughters, but their Portions are to be provided for by this means, and therefore its reasonable to advance or promote the establishing of them, so that they might be disposable be the Husband (who settles a Jointure) as Money it self may be. And so decreed for the Plaintiff.

The Lord Keeper.

The Master of the Rolls.

Martin against Scamore. June 13.

RObert Scamore being seized of the Lands being Copyhold, in Fee, surrenders them to the Plaintiff by way of Mortgage, for Money lent, and in a few days after surrenders them to the use of his Will, and then by Will deviseth them to his Wife for life, Remainder to his Daughter in Fee, and dyeth. There was a father to present the Plaintiffs Surrender at the next Court, but the Wife got her self admitted.

The Plaintiffs Bill was to be relieved for this Mortgage money, and set aside this Surrender and Will, being voluntary, unless the Wife and Daughter would pay him.

For the Wife it appeared, there was an Agreement of the Husband, in consideration of the Marriage, to settle the Premises on her for Life, and insisted that the Will and Surrender to her was pursuant to that consideration and Agreement.

For the Plaintiff it was insisted, that if a Copyholder A Copyholder having for Money agreed to mortgage his Copyhold, that by such Agreement he stands trusted for the Lender, and that no voluntary disposition afterwards could prejudice the Lender, nor no disposition for Money with notice of that Agreement: And that the Plaintiff having a Surrender ought not to be in a worse Case than if he had only an Agreement.

Court. As to the Wife she being in pursuant to a precedent Agreement to the Plaintiff's Title, would not impeach her Estate. But as to the Daughter, hers being purely a voluntary Estate, It was ordered, that unless she would pay the Plaintiff his Money he should hold and enjoy the Premises against her.

The Lord Keeper.

Justice { Twilden,
Wyld,
Rainsford.

Rofs against Rofs. July 14.

THE Case was this: Francis Rofs had Issue James his lawful Son, and John a Bastard Son, and devised by his Will in writing to his Bastard Son in Tail Lands that were held in Capite, and suffers Copyhold Lands to descend on James. James and John agree, that John and his Heirs should enjoy the Copyholds, and James and his Heirs the devised Lands.

This Agreement being executed, James had a Decree against John to levy a Fine, and settle it accordingly. John dies in contempt for not doing that (which if he had done the Estate Tail had been barred) The Defendant, the Issue of John, entered into the Copyholds, and enjoyed them: And to force him to execute the Agreement was the intent of the Bill.

Maynard for the Defendant. Its not like the Case of Octavian Lumberd, for by that Agreement the Estate Tail was made good, which otherwise would have been avoided; but a personal Agreement, or Agreement for other Lands will not bind the Issue.

A Surrender void for want of Presentment made good against a voluntary disposition.

Tenant in Tail bound by his Agreement to convey.

2 Rel. Rep. 434.
2 Vent. 350. 1 Levins 239. Hob. 203
1 Rel. Abr. 379. Pl 7. Post. 235, 236, 294.

The Issue in Tail is not bound by the Agreement.

Issue in Tail accepting the satisfaction agreed to be given, the Tenant in Tail is bound by that means.

Resolved by the whole Court, 1. That if the Tenant in Tail agree to convey, he is bound by that Agreement.
 2. If he die, his Issue is not bound by it.
 3. That if the Issue do accept of that Agreement, and enters, as in this Case, on the Land, it now becomes his own Agreement, and shall bind. And so decreed it against the Defendant.

The Lord Keeper.

George Stowel Esquire against George Long Executor of George Long. June 14.

SIR John Stowel (whose Heir the Plaintiff is) was indebted to the Defendant's Testator by Judgment and Counterbond, the Defendant's Testator having paid the Debts he was bound in as Surety for him. Sir John was sequestered, and his Estate exposed to Sale by the Parliament for his Loyalty to the late King. The Defendant's Testator bought a Farm of the Trustees for Sale, part of Sir John's Estate, and in the Purchase had allowance of his Debt by Judgment and on the Counterbond, and paid the rest of the Purchase Money, as was usual, by Bills, &c. The Defendant's Testator's Purchase was in 1652 and he entered and held till 1660. the King's Restoration. He being dead, the Plaintiff who claimed under Sir John Stowel, exhibited a Bill to call the Defendant to an account, and suggested, that the Land was conveyed by the Trustees in satisfaction of the Judgment, and that by the Profits taken the Judgment was satisfied, and therefore the Plaintiff ought to hold the Lands against the Judgment which was extended for the Defendant.

It was insisted, that for all the Profits the Defendants Testator took under the Sale, it was pardoned by the Act of Indemnity ; And that the Defendant's Testator, besides this Judgment and this Bond, paid a great Sum of Money for the Purchase. And yet it was offered to come to an account, if the Plaintiff on account would pay the Defendants the Debt due by Judgment and on the Counterbond, and the Money paid for the Purchase. And upon that offer the Court decreed it to an Account. Though
 it

it was for the Plaintiff strongly opposed, that the Debt A Creditor of a Delinquent having his Debts allowed him in the Purchase of the Delinquent's Estate, shall not be put to account for the profits under the Purchase in discharge of his Debt.

Sir John owed him by Counterbond (it not being with in the Judgment) should not be brought into the account, or allowed the Defendant. But inasmuch as that Debt was allowed the Defendant as part of the Consideration in the Purchase of the Estate, the Lord Keeper did order that to be brought into the account and allowed the Defendant, and declared, that if the Defendant's Counsel had not offered to account, he would not have ordered an account, for that all Monies received by the Profits are pardoned by the Act of Oblivion.

Troner against Hassfold. June 16

THE very same Case with that of Wembergh and Whether Arricles of Peace can discharge a Subjects Debt.

Tough before fol. 123. save that the Debt was by Bond, and entered into here. And upon a Demurrer the Lord Keeper ordered the Defendant to answer; but saved the benefit of the Demurrer to the Hearing.

The Lord Keeper.

Dame Flora Backhouse against Simon Middleton and others. June 17.

SIR William Middleton seized of the Kings Holety ^{Ante 39. Post 308. 2 And. 162.} in the new River Water in Fee, consisting of 36 shares, 1646. conveyed the same to Henry Middleton and others, upon Trust for himself and his Wife, during their respective Lives, and after that the Trustees out of the Rents and Profits of the Premises should pay his Debts and Portions for his Daughters at certain days, and after to permit Sir Hugh Middleton Heir of Sir William and his Heirs, to take and receive the Rents and Profits of the Premises. Sir William and his Lady dyed. Sir Hugh in June, 1657. contracted with William Bishop, former Husband of the Plaintiff, for Sale of fourteen shares to him of the Kings Holety for 7000 l. whereof 250 l. in hand, and the rest to be paid as Sir Hugh and Bishop and the Trustees should agree, for the Daughters Portions, which

which are ascertained by Sir William at several great Sums. In December 1657. the Defendant Simon contracted with the same Sir Hugh by Articles under Hand and Seal, for all the Kings Majesty at 15100 l. and in January after Sir Hugh and his Wife and Henry Middleton (the only native Trustee) execute a Conveyance to Simon according to the Articles. In Hillary, 1657. Bishop exhibits his Bill against Sir Hugh to enforce an Execution of the Agreement, which the Defendant answered. Hillary 1658. Simon Middleton brought his cross Bill against Bishop, Sir Hugh and the Trustees to have a Conveyance, &c. February 1659, Bishop exhibits Interrogatories in his Cause. November 1660. one Witness sworn thereon. 4 March 1660. Bishop dies, yet the Witness sworn not examined, Bishop having devised the benefit of his Contract to the Plaintiff, being his Wife, and her Heirs. 24 January 1661. She brings a Bill of Reviver. 24 Nov. 1662. She marries Sir W. Backhouse, and so her Suit abates. 27 Nov. 1663. Simon Middleton's Cause heard and decreed for him. 1 Decemb. 1663. Sir William Backhouse by Petition gets Simon Middleton's Decree scot. 2 Decemb. 1663. He brings a Bill of Reviver in his own and his Wifes Name. 18 May, 1664. He exhibits a new Schedule of Interrogatories, and on those Interrogatories some Witnesses are examined. 11 June 1664. This Cause was heard, and the Plaintiffs claiming as Devisees to the Plaintiff in the first Cause, and the Heir of Bishop, whom only it concerned to contest, the Devisee being no Party; and a Devisee not being intitled to a Bill of Reviver, this Bill was dismissed without prejudice to a new Bill.

A Devisee cannot bring a Bill of Reviver, not being in Representation to the Devisor, but in nature of a Purchaser.

Then an original Bill setting forth the former Proceedings and the former dismissal was exhibited by Sir William Backhouse and the Plaintiff his Wife, which also abated by Sir Williams death, and was revived by the Plaintiff, and answered by the Defendants. And then Issue being joyned, the Plaintiff moved to have the use of the Depositions taken upon the former Bill, which was dismissed, made use of in this Cause, those Witnesses being dead.

This Matter was several times strongly debated by Counsel on both sides, where for the Plaintiff it was insisted, That though a Bill be dismissed, yet the Depositions taken on such Bill are to be made use of here or at Law, and that the Bill was not dismissed on the point of Right, but

but for matter of form. And that its usual and frequent to use Depositions taken in one Cause, if for the same matter that is in controversy in another, especially if against the same Defendant, as here it is; which was admitted by the Defendants Council. But as to the using of Depositions in a Cause dismiss this difference was taken; that though where a Cause is dismissed the matter of it not being proper for Equity to decree, yet the fact in this Cause proved may be used as Evidence in that fact between the same Parties when ever it shall come in question again. But when a Cause is dismissed not upon that ground, but upon irregularity, as for that it comes by Revider when it should come by original Bill, so that in truth there was never regularly any such Cause in the Court, and consequently no Proofs, these Proofs cannot be used; for Proofs cannot be exemplified without Bill and Answer; nor can they be read at Law without the Bill, on which they were taken, can be read. But this Bill of Revider could not be read at Law, and therefore the Proofs taken upon it cannot be used here. And so upon long debate, and after several formal Arguments it was ruled about Michaelmas Term 1669, in this very Cause by the Lord Keeper.

When Depositions in a Cause dismissed shall be used or not.

Ant. 73, 25. Post. 233, 236. Kel. 96. a. 6. 100. a. Hard. 180. Post. 229

And now upon the hearing of this Cause, the endeavour on the Plaintiffs part was to prove a Notice in the Defendant of Bishops Contract, which was opposed by the Defendant. But the Notice being proved, it was for the Defendant insisted, that there was no ground to decree the Agreement made by Bishop, it being made by a Cestuy que Trust of the Surplus only, and the Trustees no Parties, and the second Agreement by the Defendant Simon Middleton is exempted before any Bill brought by Bishop against the Cestuy que Trust; and the principal Trustee (who being examined as a Witness swears that he did disapprove of the Agreement with Bishop, and would never consent to it. And it was farther insisted for the Defendant Simon, that the Agreement with Bishop was not pursued, nor could Sir Hugh enforce the payment of the 6750 l. it being to be paid as the Trustees and he should agree, so that that was no compleat Agreement; and the Trustees disagreeing, and having executed the order to Simon the Defendant, the Agreement with Bishop ought not now to be decreed, especially for the Plaintiff, who claimed the benefit of it by Devise only, which at the best was a Devise of an Equity on an Equity.

An Agreement for the Purchase with the Cestuy que trust of the Surplus not good unless the Trustees are Parties.

But

But for the Plaintiff it was insisted, that the Trustees had not by the Trust power to sell, they being to pay the Daughters Portions out of the Rents and Profits.

A Trust to pay Portions out of Rents and Profits at prefixt days gives the Trustees power to sell.

To which it was replied by the Court, that the Trustees were not to pay the Portions out of the annual Rents and Profits, but out of the Rents and Profits, and those Portions were to be paid at prefixt days, which the annual Profits would not do; and therefore conceived the Trustees might sell for that purpose within the intention of the Trust, and so declared he was of Opinion to dismiss the Bill, but withal said he would think further of it. Vide the end of this Cause in Cornbury against Middleton.

The Lord Keeper.

Pitt and others against Pelham and his Wife; and Mabel Shirly. July 4.

1 Chan. Rep. 283.

William Shirly seized of the Lands in question, settled them on Jane his Wife for a Joynture, Remainder to the Heirs of their two Bodies, Remainder to his own right Heirs. Afterwards in 1657. he made his Will in Writing in these Words, I make my dear Wife my sole Executrix: My Land at *Blandford*, which is my Wifes Joynture (which is the Land in question) I confirm unto her; and after her death I appoint it to be sold, and the Money that is made of it, to be divided in equal portions amongst these four, namely, one part of it to be disposed of by my Wife, and one to *William Major*, one to *Ezra Shirly* (who was Heir at Law) and one to *Jonadab Savidge*, and in case any of my three above named Nephews shall dye before the death of my Wife, my cousin *Roger Higham* shall have the portion of Money, which upon selling my Land at *Blandford* should have fallen to that Nephew, and dies, leaving *Ezra* his Heir. *Ezra Shirly* dies before Jane, leaving the Defendants the Women his Sisters and Co-heirs. Jane the Executrix, Major, Savage and Higham in 1663. exhibit their Bill against Mary and Mabel the Defendants, to prove the Will, and compel them to sell. They answer, and in 1664. Witnesses are examined. Pending this Suit the now Plaintiff being only Tenant to part of the Lands from year to year, purchases of Major, Savidge,

vage, Higham and Jane, their Interest given them by the Will. Jane dies in 1666: and makes Higham and Harris her Executors; the now Plaintiffs Pitt, Major, Savage, Higham and Harris exhibit their Bill to compel the Co-heirs to convey the Land to Pitt and his Heirs.

The Cause was first heard before the Master of the Rolls, and it was then ordered a Case should be drawn up and heard before the Lord Keeper.

And on Hearing before the Lord Keeper 7 Novemb. 1668. because the Cause appeared to be of weight and consequence, his Lordship ordered Copies of the Case to be delivered to Justice Twisden and Justice Wild, and will advise with them and appoint a day to deliver his Opinion.

29 April 1669. the Cause was heard by his Lordship, assisted with those Judges, at which time it was by Serjeant Maynard insisted for the Plaintiff, that the Will was good in Law if the same was executed, but could not compel an Execution at Law, and therefore Equity ought. And as to the pretence that there was no person named to sell, he said, that when the intention is clear, all means without which that cannot be attained must be supplied by a Court of Justice, Dyer 371. b. 2 Leon. Rep. 220, a Case in point, and the Devisor hath power to dispose as he pleaseth: And though the Devise be not of an Estate, but of an authority to sell, its good within the Statute. And if a Devise be to an Heir upon a Condition that he sell, this Condition is void; but yet it is good by way of Trust in Equity, for it lies within the power of an Ancestor to charge his Lands with a Trust, and the Heir must sell. And the Presidents of the Court do run, that the Heir is to sell, and cited Batersby and Prince in the Lord Coventrys time, and Tennant against Brown, 18 Feb. 1659.

When the intention is clear, Justice must supply the means to attain it.

A Devise to an Heir on Condition, void in Law, yet good in Equity.

Serjeant Fountain for the Plaintiffs. Originally this is a good Will, and the Land might have been sold; and if by any accident it be prevented, as by the death of the Executor, this Court ought to help it. And it is not denied, that if the Will had been to sell to pay Debts, it had been good, and the Heir should have sold: And there is no difference between Debt and Legacies, and here the Money is given for Legacies, but shall be raised by the Sale; and he relied on it, that the Executor might have sold.

Mr. Solicitor Finch for the Defendants. There are two Questions: 1. What the Law is? 2. What the Equity? The Law is against the Plaintiffs. If Land

A a

be

When Lands
are appointed to
be sold, and no
person appoint-
ed to sell, the
Executor shall
sell.

be appointed to be sold for payment of Debts, and no person is appointed to sell, the Executor shall sell, because the Soul is concerned, which the Executor is to take care of. But it's otherwise in a voluntary disposition, as here; and it is not like the Case of Howel and Barns, 1 Cro. 382. for there the Executors were appointed to sell.

Serjeant Ellis for the Defendants. The Devise is a void Devise in the creation, because no person is appointed to sell; or if good in the Creation is void ex post facto, for no Bond of the Ancestor binds the Heirs, unless he be expressly named.

The Lord Keeper doubted whether the Will be void in the Creation; for it's against a Rule in Law, to make it void, if by any construction it can be made good.

Twisden doubted that the Executor of the Executor cannot be compelled to sell in this Case, the Sale not being to be made till after the death of the Executor.

Wyld conceived the Devise good in the Creation, the intent appearing; and the Case in Leonard is the very Case, and was of Opinion, that the Executor of the Executor shall sell; but doubted whether the Heir be compelled to sell.

Presidents on both sides were given in to the Lord Keeper and the Judges. And 18 May, 1669. the Lord Keeper after advice with the Judges in order to the determination of the Cause, ordered a Tryal of these Points in a feigned Action.

1. Whether Jane the Executrix had Power, and could by the Will have sold the Lands?

2. Whether a Sale by her Executors (admitting such Sale to be actually made) be a good Sale?

And after Tryal either Party to resort to the Court for a final determination.

Upon the Tryal by consent of Counsel a special Verdict was found, and upon several solemn Arguments thereon by Counsel on both sides at the Common Pleas, the Court gave Judgment unanimously on both Points for the Defendants. Thereupon the Defendants move to dismiss the Will. And it is ordered that the Cause be set down for hearing before the Lord Keeper upon the Equity reserved.

And now upon Hearing thereof before his Lordship, it was for the Plaintiff insisted, that it was plain by the Will that the Lands should be sold, and no person by Law can
sell

sell but the Veit, and therefore the Veit must sell; and that Matter was not tryed, but the Matter tryed was improper, for it was not to the purpose. And the Presidents of the Court run, that the Veit should sell, and therefore though the other Issues tryed are against the Plaintiff, that is not, but remains in Justice for the Plaintiff; and cited divers Presidents, viz.

Hughes and others Plaintiffs against Collis Defendant. 1 Febr. 16 Car. I.

The Case was thus. The Plaintiffs were Creditors of the Testator. The Defendants were his Executors, and Daughters Legatees. The Bill was to enforce the Sale of the Testators Lands for payment of his Debts by the Executor (who by Answer submit to sell, if the Court thought fit, having in truth sold part before.) And the Words of the Will were thus: As for my Lands, Tenements, Goods and Chattels, I give and bequeath, as followeth: After my Debts paid to my five Daughters 100 l. a-piece, and to be paid at their Ages of twenty years: Also I give to my Wife, whom I make my Executrix, all the rest of my Lands and Tenements, Goods and Chattels. The personal Estate was not sufficient to pay the Debts, nor could the Executrix out of the Profits of the Premises, being but 63 l. per annum, raise Money to pay the Debts and the Daughters Portions, being 500 l. Therefore the Court conceived it was intended by the Will, that the Executrix should raise Money to pay the Debts and Legacies, and decreed the Executrix to sell accordingly, and by Sale to satisfy the Plaintiffs; but before the Executrix was to receive any part of the Purchase Money, she was to give Security to pay the Daughters their Portions at their Ages of twenty years (they being then in their Infancy) and that the Daughters should, when they came of Age, release the Lands to the Purchaser.

Hughes against Collis.

Portions devised out of Lands payable at prefixed days, which the Premises will not do, amounts to a Devise to sell.

Another President was,

Lockton against Lockton. 13 Nov. 13 Car. I.

Where Lands were devised to be sold, and the Monies to be distributed to several persons, and no person was named to sell, there by consent of Counsel it was decreed that the Executor should sell.

Lockton against Lockton.

222

Another

Another President.

Asby and others, Creditors of Walker, against Doyl and others Heirs of Walker.

The Words of the Will were these: My Will and Mind is, and I do hereby authorize that my Executors hereafter named shall sell my Lands and Woods thereupon growing, to any person or persons, and their Heirs, for the best value, and with the Monies thereby raised to pay all my just Debts, 16 Febr. 1655. The Lords Commissioners assisted with Judges (the Executors being dead) upon View of Presidents decreed the Heirs to sell.

Tenant against Brown.

The Executor of an Executor to sell when the Executor fails to sell.

Tenant and others against Brown and others, 18 Feb. 1659.

The Sale being to be made expectant upon a contingent Estate, which did not happen in the Executors time, that was decreed to make the Sale; but hapning after his death, his Executor, and those that claimed the Land after his death, decreed to sell.

And for the Plaintiff in the original Case it was strongly insisted, that it was all one where Lands were devised for payment of Legacies or younger Childrens Portions, and for payment, of Debts and that was as much a Trust of Lands in the principal Case that it should be sold, and the Money paid, as it is where Monies are appointed to be paid out of the Profits of the Lands.

Edwards against Groves, Hob. 265.

Whether the Heir shall be forced to sell Land devised to be sold after the death of the Executor, when no party is named to sell.

A difference between a Devise of Money out of profits of Lands, and of Money raised by Sale of Lands.

The Lord Keeper. This is not like the Case where a Father makes Provision for younger Children; for a Parent is bound to provide for them; nor is it like to the Case of a Sale to pay Legacies at large; but here they are Sums in gross; and conceived a difference may be taken between the Principal Case and Monies appointed to be raised out of the Profits of Lands, that doth not amount to a total difference, but only a Charge upon the Land in the Heirs hand, and so that labours more of a Trust than in the Principal Case; and so decreed the Bill to stand dismissed; but with directions, that this should be no President.

The

*The Lord Keeper.**Justice Twisden.**Justice Wyld.*

Pheasant and others, Executors of Walter Pheasant, against Ann Pheasant, the Relict of Walter Pheasant, the Mayor and Commonalty of London, and the Chamberlain. July 4.

Walter Pheasant having taken to Wife the Defendant Ann, who was an Orphan, and had her Portion in the Chamber of London, after his Marriage took out 40 l. thereof, and by Will gives his said Wife her Portion in the Chamber of London, being 2800 l. and other things to the value of 1000 l. on Condition she renounce her Dower. She accepts this Legacy before and after her Husbonds death. The Bill was to perform the Will and to renounce and release her Dower. She hath a cross Bill for her Portion in the Chamber of London against the Executors of her Husband, the Mayor and Commonalty and Chamberlain, and insists that her Portion belongs to her in regard the Security was unaltered by her Husband in his life time, and so was as much as if it were a Debt due to her by Bond, and sought to recover her Dower besides.

For the Executors it was insisted, that the Monies in the Chamber of London is not there as a Common Debt, but vests in the Husband by Marriage, it being only deposited to remain there till the Orphan comes of Age, which she attained during the Coverture. And it was also insisted, that the receiving of 40 l. out of it is an alteration of the property, and owning of the Husbonds Right to the whole; and that however she was concluded by the acceptance of her Legacy in lieu of her Dower. And it was said that the Mayor and Chamberlain have only the Custody of the Child, but not the Property of her Honey, but that is in custodia Legis until she comes of Age, and is only depositum and not debitum in the mean time; and it would be inconvenient if the property of
the

Vent. Rep. 340.

the Portion did not vest in the Husband by Marriage, for by the Marriage the Woman becomes dowable.

The Portion of an Orphan in the Chamber of London is of such a nature, that if the Husband die without altering the Property, his Widow, and not his Executors shall have it. The acceptance of a collateral satisfaction for Dower no Bar of Dower.

The Lord Keeper conceived the Money in the Chamber of London is a Debt, for the Chamber pays Interest for it, and if so, her acceptance of the matters devised to her will not bar her Dower, according to Vernons Case, 4 Rep. The acceptance of a collateral satisfaction is no Bar in a Writ of Dower; and so conceived Ann Pheasant is intitled to the Money in the Chamber of London, but said he would consider of it.

And 30 Octob. 1670. for the Executors of the Husband it was insisted, that the Mayor and Commonalty have but the Custody of the Body and Goods of the Orphan, New Entries 346. And so the Property is in the Orphan; and the Orphan hath in truth a legal possession, the Chamberlain being in the nature of a Servant to the Orphan; and Possession of the Servant is Possession of the Master, 1 Cro. Jac. 37. So that by the Marriage this Money is the Husbands. As if an Infant Feme bring Money into this Court, and marries, and dies, the Property is in the Infant, and by Marriage becomes the Husbands. But it was answered, that was not like the principal Case; for here the Chamberlain pays Interest, &c. but no Interest is payable for Money in Court; and the Property here is in the Infant. And so all agreed the Monies belong to the Widow, and not to the Executors.

DE
Term. Sanct. Mich.

Anno Regis 22 Car. II.

IN
CANCELLARIA.

The Lord Keeper.

Tall against Ryland. October 13.

On a Demurrer.

TH E Plaintiff and Defendant were Fishmongers, and had contiguous Shops; and Differences having been between them they were made Friends, and by that Mediation the Plaintiff was to give, and did give the Defendant a Bond of 20 l. penalty, conditioned to behave himself civilly and like a good Neighbour to the Defendant, and not to disparage his Goods. The Plaintiff afterwards asked the Defendant's Customer, whilst cheapning a parcel of Flounders, why he would buy of the Defendant, and told him those Fish stunk, and so the Defendant lost that Customer; and the Defendant having sued the Bond and assigned that for breach, had a Verdict. And to be relieved against that Verdict and the Penalty of the Bond was the Prayer of the Bill, which alleged that the Damage was not considerable nor valuable, and therefore the Plaintiff ought to be relieved against the Verdict for the Penalty.

The

No Relief in Equity against a Bond not to disparage another Mans Goods.

1 Sid. 442.

No Relief to be given against a penal Bond, where there is no measure to ascertain the Damages for the Breach.

The Defendant demurred, for that the Bond was not conditioned for payment of Money or performance of Covenants, or for any matter for which Damages in an Action of Debt, Covenant or any other Action was recoverable, nor was there any way to measure the Damages but by the Penalty.

And the Bond being to preserve Amity and Neighbourly Friendship, for the breach of which the Plaintiff did submit to pay that Penalty, and there can be no Trial had to measure the Damages for breach of the Condition, other than the Parties have submitted to.

His Lordship declared, That as this Case was, the Penalty being but 20 l. he did not think fit to put the Defendant to answer, for that the Costs of Suit here and at Law would exceed the Penalty, and so the Demurrer was allowed. But his Lordship declared this was not to be a Precedent in the Case of a Bond of 100 l. or the like; and though the Demurrer was allowed, the Defendant was to have no Costs.

The Lord Keeper.

Palmer against Whettenhal. October 13.

Upon a Demurrer.

THE Bill was, That the Plaintiffs Brother was seized in Fee of a Rent of 7 l. per annum, and had the same paid him by the Owner of the Lands out of which this Rent issued during his Life, and that by his death this Rent descended on the Plaintiff as Heir, and that the Owners of the Land did pay the Rent to the Plaintiff till 1641. and there had been several Conveyances made of the Land in the late Troubles; and so no Rent paid since 1641: and that the Lands were now come to the Defendant, and so the Bill prayed that he might be decreed to pay the Rent and Arrears.

The Defendant said he did not know any such Rent was issuing out of the said Lands, and that he and those under whom he claims, had enjoyed those Lands thirty several years under divers Purchases, without any demand of the Rent that he knew of, till the Bill, and demurred.

For

For that the Bill sought to subject his person (which was not to be liable at Law) to pay the Rent and Arrears, and for that it having been so long unpaid, it was to be presumed the Rent was extinguished. And however it appearing by the Bill, that the Plaintiff had Seisin, he might by his Affize at Law; and if that had not been a Seisin, it was said that all the Relief this Court would have given, would be but to give Seisin. And on Debate the Demurrer was allowed.

The person is not to be sub-jected in Equity to a Rent.

No Relief in Equity for a Rent of which the Plaintiff hath Seisin.

After 805. Pl. 1093. Lard, 146. 4 Lem. 184. 181. 79. 147.

The Lord Keeper.

The Master of the Rolls.

Justice Rainsford.

Justice Windham.

Hide against Pettit. October 25.

THE Parties in Court signed an Order by consent to refer their matters to Arbitrators finally to determine, and their Award to be final, and stand ratified by Decree without any Appeal. One of the Parties after that he had attended the Reference, and found they inclined to order him to pay the other Party a Sum of Money, Countermanded the Submission.

And the first Question was, Whether this Submission was revokable?

Of which the Lord Keeper at first seemed to doubt; but on Argument and producing a Precedent in point, Norton against Rowland, 8 July 1664. and 10th of the same July, the Judges were both of Opinion, that there could be no Submission to an Award in Law or Equity, but what was revokable, and that nothing under a Legislative Power can make such a Submission irrevokable, which in its nature is revokable. But it was an abuse to the Court, as it was conceived, to revoke it, for which the Court might justly lay the Party by the heels. And so in this Cause an Attachment was awarded against him nisi causa. In this Case it was observed, that whereas formerly the course was upon Submission to award an Attachment against the Party failing, yet of late the Courts of Law do refuse to grant Attachments in such Cases,

A Submission to an Award by consent of Parties by order of this Court is revokable.

Attachment against a Party revoking a Submission to an Award by Order by Consent.

B b

but

but leaves the Party to his Action, the Rule being Evidence of his Submission.

In the principal Case the Arbitrators had determined some Matters, and had left others undetermined, and submitted those other Matters to the Court: And whether this was therefore such an Award (being but part of the Matters referred) as was fit for the Court to decree, was the Question. And though at Law an Award may be good, though but for part of the Matters referred, unless the Submission be conditional to make an Award on the Premises; yet Equity, as it was insisted, ought not to decree such an Award, unless it be of all Matters referred. And so were both the Judges of that Opinion; for its not a determination pursuant to the Reference, and so the Award was set aside.

Equity will not decree an Award unless it be of all Matters referred.

The Lord Keeper.

Justice Windham.

Squib and Bradshaw against Bolton Octob. 25.

THE Question was, If upon a Submission by Order of Court by Consent to Arbitrators, and the Award to be final and stand decreed, any Exceptions lie to such an Award as to a Report. And whether, if it were an unjust Award, the Court ought to decree it; and whether the Court should examine the Justice of the Award, and the Merits of it, which the Master of the Rolls had taken upon him to do in this Cause, by ordering the Arbitrators to certify the Court whether they had considered of certain particulars, which the Party disliking the Award, said, they had not, which were in issue in the Cause. And upon an Appeal from the Master of the Rolls Order, it was now ordered that the Parties should attend the Master of the Rolls, and satisfy him in what he doubted. So here the Court examined the Justice of the Award which in this Cause, and the next precedent, the Court did think upon Circumstances, might be done, and that if an unjust Award was desired to be confirmed by Decree, and the Court informed of it, the Court ought not to decree it.

Whether Exceptions are to be admitted to an Award on a Reference by Consent.

The

*The Lord Keeper.*Bush *against* Rishley. October 31.

THE Bill was to have a Rate Tythe settled by Decree against the Impropriator, and prevent multiplicity of Suits.

And for the Plaintiffs it was prayed, that the Court would either decree that the Plaintiffs should hold their Lands under that Modus decimandi, which at a Tryal at Law pending this Suit was found by Verdict, or that the Court would direct another Tryal to try the verity of the Modus, and reserve the Cause till after the second Tryal (if the Court were not satisfied with one Verdict) It being insisted, that after such Tythe Rate had been ascertained by two Verdicts, the Court ought to decree an Enjoyment of the Lands, for which the Modus was payable under that Rate Tythe, and discharge the Tythe in kind; and it was compared to the Case of Coppholders, that have their Fines and Services ascertained by the aid of this Court, by directing of Tryals for that purpose first, and after decreeing according to the Verdicts on such Tryals.

But for the Defendant it was insisted, that this Court had not at any time decreed a Modus decimandi, and that Tythes were payable in kind by Common Right.

And though it was insisted for the Plaintiffs that it was frequent in the Exchequer to decree a Rate-Tythe, the Lord Keeper did not think fit to decree in such a Case, but ordered two Depositions to be made use of at Law, as occasion served. And dismiss the Bill.

A Rate-Tythe is not to be decreed in Chancery.

*The Lord Keeper.
Justice Wyld.*

Bagg against Foster,

On a Demurrer

William Bushel on his Marriage with Dorcas his Wife, enters into a Bond of 1000 l. to Trustees to her use, in August 1648. conditioned to be void, if he did not within two Months settle the Land in Question on those Trustees, to the use of himself and Dorcas, and their Heirs in November next. After William Bushel covenanted with one of the Trustees to stand seized of those Lands to the use of himself for Life, Remainder to Dorcas for Life, Remainder to his first and tenth Son in Tail, Remainder to his own right Heirs. William Bushel dies without Issue; Dorcas survives many years, and marries with one Bagg, by whom she hath Issue the Plaintiff, her Son and Heir, an Infant. And now in his behalf the Bill is brought against the Defendant, who claims under the the Heir of William Bushel, to enforce a Conveyance according to the Condition of the Bond.

For the Defendant it was demurred unto, for that the Bond was in 1648. and William Bushel in November after made a Settlement, ut supra, to which one of the Trustees was a Party. And for that there is no Issue of the Plaintiff's Mother, and William Bushel, and the Plaintiff, a meer Stranger to William Bushel, being the Child of Dorcas by another Husband, and that the Conveyance, ut supra, ought reasonably to be intended for a performance of the Marriage Agreement, and at least that the Plaintiff ought not to have any Relief in Equity, it not appearing that any Possession hath gone according to the Bond, or that any Relief was till now sought, though it be one and twenty years since.

On the Argument of the Demurrer it was for the Defendant insisted, that there being no Agreement but what was in the Condition of the Bond, and no Articles or Agreement besides, and the Bond two and twenty years old, and such Settlement, ut supra, made unto one of the
Obligees

Obligees of the same Land mentioned in the Condition, though not to the same Uses, and Dorcas never question-
 ing it in her Life, and the Agreement being secured by An Agreement contained in the
 Penalty, which was relied upon, that this Case did differ Condition of a
 much from an Agreement by Articles to settle Lands, for Bond shall not
 here the Party rested on a Penalty, and there was, no be turned into a
 reason to turn such an Agreement as this was, into a col- collateral Exe-
 lateral Execution by decreeing the Land, which the Court cution by Decree
 did conceive reasonable, and so allowed the Demurer. of the Land.

The Lord Keeper.

Withers against Kelsea. November 16.

A Father gives his Daughter 300 l. Portion charged on Lands, and dies: The Daughter marries and hath a Joynture settled on her by her Husband, and hath no other Portion but the 300 l. The Husband, dies before any part of the 300 l. was paid. The Plaintiff is the Executor of the Husband, and sues the Widow and the Heir of the Lands for the 300 l.

The Question was, Who should have the 300 l. whether the Executor of the Husband or the Wife?

For the Executor of the Husband it was insisted, that he having settled a Joynture in consideration of the Portion, which Joynture the Wife enjoyed, that thereby in Equity the Right of the Portion was so vested in him, that the Executor, and not the Wife ought to enjoy it.

Where the Portion in Money shall go to the Executors of the Husband, and not the Wife surviving.

The Lord Keeper declared, That this 300 l. being to go out of the Rent of the Lands, and charged upon Lands, was not in the nature of a thing in Action, but of a Rent, and given to the Husband by the Marriage: And so decreed for the Plaintiff the Executor. Sed quære, for a Rent belonging to a Feme doth, in case she survive the Husband, belong to the Wife, and so the Arrears that incur during the Coverture, 1 Inst. 351.

The

The Lord Keeper.

Justice { Twilden,
Wyld,
Rainsford,
Windham.

Holt against Holt. December. 7.

Alexander Holt a Citizen of London, seized and possessed of Houses in London, and elsewhere of a publick Title, and possessed of Houses in St. Martins in the Fields by Lease from the Church of Westminster, 18 May 1656. by his Will in Writing gave 10000 l. to his Daughters, being his only Children, and Orphans, to be paid out of his Estate Real and Personal at their Age of one and twenty, or Marriages (which first shall happen) and made Alexander Holt his Nephew, and others his Executors, and dyed. The Executors proved the Will; and the Executor Alexander and others, as his Sureties, in 1658. entered into a Recognizance to the Chamberlain of London, for the payment of the 10000 l. (which by the Will was first to be paid) before any others should have any benefit of his Lands, &c.

By the Restauration of the King the Lands of the publick Title reverted to the right Owners. And by the Fire in London the Houses of the Testator in London were burnt down, so that it was to be doubted his whole Estate would not amount to the 10000 l.

And the first Question was, Whether the Recognizance should in Equity extend any further than only to make good to the Orphans so much as the Testators Estate, considering the Losses aforesaid, and as it now was really worth?

And it was insisted by the Counsel of the Sureties of the Executors, that it ought not to be binding any farther in Equity. For that if the Chamber of London had taken the Estate of the Testator into their Hands, it would have been in no better plight than now it is. And the intention of the Security was but that the Executor should not misemploy or waste the Estate, which (as it was declared) they had not done, but were ready to account for what they had already received.

The

The Court as to that Point were all of one uniform Opinion, that the Recognizance should be made use of no further than to make good the value of the Testator's Estate over and above the Losses by Fire, and the King's Return, and decreed the same accordingly.

Albeit it was insisted for the Orphans, that the Condition of the Recognizance was generally for payment of the 10000 l. (and so it was) And the Executor Alexander had thereupon taken upon himself the absolute Ownership of the Estate, and managed it as his own. And that now a Loss had befallen the Estate, the Orphans ought not to be carried back to the Account of the Testator's Estate, for that by the Recognizance the Orphans Portions were now become Debts. Nevertheless for the Reasons before it was decreed as aforesaid.

And the next Question was, Whether the Lease held of the Church of Westminster, which had been renewed by the Executor, and a fine paid, and new Houses built thereupon by the Executor, should be taken to be part of the Testator's Estate?

For the Executors it was insisted, They were not Executors in Trust for the Orphans, but were to pay them out of the Estate 10000 l. only; and the Estate was looked upon at the Testator's making his Will, and really was then and before the said Losses of much greater value, and a benefit was intended the Executor Alexander by the Testator. But the Court did unanimously agree, That the Daughters should have the benefit of the renewed Lease paying the fine and other Charges of improving. And so it was decreed accordingly. But this must be understood so far only as to the completing the Orphans 10000 l.

But it was agreed by the whole Court, that in case of an Executorship in Trust, the renewal of such a Lease shall go to the benefit of Cestuy que Trust.

The condition of a Recognizance qualified in Equity according to the Equity of the Matter before the Recognizance was given.

A Condition of a Recognizance for payment of Money generally, qualified in Equity to the original Equity.

Where a Lease renewed by an Executor shall be lyable to a Legacy of the Testators.

If a Trustee of a Term surrender and take a further Term, that shall be for the benefit of Cestuy que Trust.

D E

Term. Sanct. Hill.

Anno Regis 22 & 23 Car. II.

I N

CANCELLARIA.

Judge Moreton.

Verhorn *against* Brewine and others. Jan, 18.

THE Plaintiff sued as Administrator to have a discovery and an Account of the Estate of his Intestate.

The Defendant pleaded that the supposed Intestate made a Nuncupative Will, and another person, whom he named in his Plea, his Executor; and insisted he was not answerable or accountable to the Plaintiff, nor to any other but the Executor.

A Nuncupative Will is not pleadable in any Court before Probate.

On debate it was ruled, that before Probate of the nuncupative Will (which is only to be proved in the Ecclesiastical Court) it is not pleadable in any Court against an Administrator; and so the Plea was over-ruled.

William

William Barber *against* William Took and
Charles Lindsey. January 25.

Mathew Lindsey was seised in Fee of the Lands in Question, and by Will in Writing deviseth them to the Plaintiff in Fee, and after mortgage those Lands to the Defendant Took for years, and dies, the Defendant Charles Lindsey being his Cousin and Heir.

And the Question was, Who should have the Redemption, the Plaintiff Barber or the Heir?

For the Plaintiff it was insisted, That the Devise to him, being of the Fee, and the Mortgage after being but a Term for years, that was a Revocation but *pro tanto*, and not *pro toto*, and the Devise did notwithstanding pass the Reversion, and consequently the Equity of Redemption.

A Conveyance for years is not a Revocation of a Devise in Fee, but *pro tanto* only.

And of that Opinion was the Judge. But the Defendant, the Heirs Counsel, insisted, that there was an actual Revocation of the whole Will. It was directed to be tried whether there was an actual and total Revocation.

The Lord Keeper.

The Poor of the Parish of St. Dunstan, by English Bill, against Beauchamp. Feb. 6.

A Decree having been made by Commissioners upon the Statute of Charitable Uses, those for whom the Decree was made brought an Original Bill, setting forth that the Defendant to the Decree threatened, when the Witnesses were dead, they would except to the Decree, and so prayed that the Defendant might shew Cause, why the Decree should not be confirmed. The Defendant by Answer submitting to the Decree, it was decreed by the Lord Keeper, That the Decree of the Commissioners should be confirmed.

A Decree by Commissioners for Charitable Uses, confirmed by original Bill.

Quod nota, and Quære, What need of such a Bill; for that when a Decree is made by Commissioners, the Course is to return it into the Petty-Bag, and then to serve the Defendant with a Writ of Execution, upon which

The course of Proceedings in Petty Bag on Decrees of Charitable Uses.

which Service the Defendant may file Exceptions, and pray to stay Proceedings till they be heard. But if the Defendants do not then except, but submit to the Decree, it seems reasonable they should be concluded thereby, and not be admitted to Exceptions after.

The Master of the Rolls.

Dakins and his Wife against Berisford. Febr. 6.

Letters were devised to the Defendant by his eldest Brother, to be sold for several purposes, and amongst others, in Trust that the Defendant should purchase in his own Name an Annuity of 80 l. per annum, for the Life of the Plaintiffs Wife, and pay the same to her and her Assigns. The Bill was to enforce the payment of this Annuity.

The Defendant insisted by Answer, that he had constantly paid the Annuity to the Plaintiffs Wife (from whom the Plaintiff lived apart) and that the Bill was against her Consent, and that it was the intent of the Donor to be for her only benefit, the Will being, that he should buy in his own Name the Annuity in Trust for the Plaintiffs Wife (who is the Defendant's Mother) and her Assigns, and so insisted, that the Plaintiff not inhabiting with her, he ought not to be put to pay the Annuity to him. It appeared by Proofs that the Cause of the Plaintiffs first absenting himself from his Wife was for fear of Debts, and that he had since solicited her by Letters to co-habit, but she refused.

A Trust for the benefit of the Wife without negative words doth not exclude the Husband.

The Master of the Rolls declared, That in this Case the Husband was the Assignee of the Wife, and that there being no negative Words by the Will to exclude the Husband from the Annuity, he could not exclude him; and so decreed the Defendant to pay all the Arrears of the Annuity since the Bill exhibited, and the growing Annuity for the future to the Plaintiff the Husband.

The Lord Keeper
Justice Twilden.
Justice Moreton.

Smith and others against Stowel and others.
February 17.

THERE was a disposition in 1579. (which was before the Statute of 43 Eliz. for Charitable Uses) to a Charity, part of the Lands were of a defective Title, and the whole Disposition void, being before the Statute. But an Agreement was made between the Parties interested and the Trustee, for the selling the Lands, and so much as was proportionable in value to what the Donor had to give, and this was settled accordingly before the Statute, and long Leases were let of the Ground to divers Tenants, at small Rents, so build who had thereby improved that Ground that was but 10 l. per annum to 150 l. per annum.

A Decree was made by the Commissioners for abolishing the Tenants Leases, they not being in Statute of Law good. Upon Exceptions to that Decree, it was declared by the Court, that though the Charity was precedent to the Statute, yet the Statute subsequent had a retrospect and would make it a good appointment, that was not so before (but void.) And it was declared, that so as the Tenants be no losers they ought not to be gainers in the Case of Charity. And so ordered, that during the Tenants Leases there should be an Augmentation of 50 l. per annum allowed by them in proportion to the Rent.

An Appointment to a Charity that was precedent to the Statute of 43. Eliz. and so void, is made good by the Statute.

Ter-Tenants Lessees of a Charity ordered to augment their Rent.

There they were not to be losers, but to be gainers in the Case of Charity. And so ordered, that during the Tenants Leases there should be an Augmentation of 50 l. per annum allowed by them in proportion to the Rent.

The Lord Keeper.

Justice { Twilden,
Wyld,
Rainsford.
Windham.

Henry North *Esquire against* Charles Crompton
Esquire. March 25.

K Atharine Crompton Spinster, seized in Fee of the Lands in Question, by her Will in Writing the 21st of January 1669. expressed thus: I ordain and constitute Henry North Esquire, (which is the Plaintiff) to be mine Executor of this my last Will. And I do give all my Estate, real and personal, to dispose of for the payment of all my just Debts; and for the performing of all such Legacies as I have herein, or by the Codicil annexed, bequeathed unto my Executor abovenamed; and given several Legacies in Money, and amongst others 200 l. to the Defendant her Uncle, who is Ventr at Law; and a Legacy of 500 l. being omitted to the Plaintiffs Sister, it was inserted in a Codicil.

Mr. North's Will was to prove this Will per Testes.

Mr. Crompton's Will was to be relieved upon the Trust of the Devise as he supposed after the Debts and Legacies paid, and to discover what the Debts were.

These Causes came first to be heard 8 Febr. 1670. before the Lord Keeper and Baron Wyndham, and then these two Questions were stirred by the Court.

1. Whether this were a Devise of Lands in Fee?
2. Whether Mr. North (the Plaintiff Crompton claiming by an implied Trust) after Debts and Legacies paid, might not be admitted to aver against that Implication?

Of both these Points the Court took time to Consider.

3 March 1670. The Cause being heard again before the Lord Keeper and Mr. Baron Wyndham, they declared they were both of Opinion, That it was a Devise

or

of the Lands in Fee, and then they doubted whether a Trust A Devise of all
be created for the Heir, of the Surplus. And another Estate real and
Question they made, If a Trust, whether an Adornment did personal for pay-
not lie for Mr. North, it being but an implied Trust, ment of Debts,
and not within the Statute of H. 8. Of Wills. is a Devise in
Fee.

And 25 March 1671. the Lord Keeper and the four No implied
Judges all agreed, That a Fee passed by the Devise. Trust of the
And as to the implied Trust all conceived there was Surplus for the
not any implied Trust for the Heir for the Surplus; Heir.
for if there were, the Devisees had no benefit, and to no
purpose was the Devisee of the 200 L. to the Heir, if the
had intended the Surplus to the Heir.



DE

Termino Paschæ

Anno Regis 23 Car. II.

IN

CANCELLARIA.

The Lord Keeper.

Thomas Martin Clerk, against Douch and Overton.

ON E Foster devised to the Plaintiff in these Words, *Item*, I give to my Cousin Thomas Martin Clerk, late Minister of Houghton in Northamptonshire, and living thereabouts, I do order 40 l. to be paid him to be disposed of for certain Uses, which I shall in a private Note acquaint him with, and gave him no Note or direction how to dispose of it, but died, the Defendant's being his Executors. And whether the Plaintiff should have the 40 l. was the Question.

A Sum of Money given to one to dispose as the Testator shall appoint by a Note, who dies without such appointment, a good bequest to the Party.

The Master of the Rolls was of Opinion the Plaintiff should have the 40 l. for that the Testator did not intend it should come to his Executors, but had by his Will given it away from them; and so he decreed the Defendant to pay the 40 l. to the Plaintiff.

The

*The Lord Keeper.*Pate *against* Hatton. or Hutton. May 15.

A Citizen and Freeman of London deviseth to his Son a gross Sum, which did exceed the Customary part, and deviseth that if his Son dye before he attain one and twenty, that Sum over to another.

The Question was, If the Devise over was good?

A Citizen in

And it was adjudged, and so decreed by the Lord Keeper, That the Devise over for so much as was the Customary part, was void, and that the Dyphar dying within Age, his Administrator was intitled to so much as was the Customary part, and the Surplus of that gross Sum to go to those to whom it was devised over.

London cannot devise his Childs part over to another, in case the Child die in Minority.

*The Lord Keeper.*Lambert *against* Bainton. May 15.

MR. Dunch in 1646. had conveyed the Lands in Question to Sir Edward Bainton in Fee, in Trust to sell all, or any part of it for payment of his Debts. Sir Edward Bainton had conveyed his Lands to his Son, and was dead. Dunch being dead and the Plaintiff being intitled to the benefit of the Trust after the Debts paid, brought the Bill to abate the Conveyance made by Sir Edward Bainton to his Son, and so have a Reconveyance.

For the Defendant it was insisted, That though it was a Trust in Sir Edward, yet Sir Edward had paid the Debts to the value of the Estate, and was thereby become a Purchaser as much as if he had sold the Lands to another.

Where a Trustee for Sale of Lands for payment of Debts pays to the value of the Lands, thereby he becomes a Purchaser himself.

The Lord Keeper declared, That if Sir Edward Bainton had paid to the value of the Lands, he was a Purchaser; but it not appearing what he had paid when he

made the Settlement more than he received, referred it to a Master to examine, and declared, that the Defendant, as to so much as Sir Edward had then disbursed, should be taken as Purchaser, because Sir Edward might sell all or any part; and so the Defendant is a Purchaser pro tanto.

The Lord Keeper.

William Vanbrough against William Cock and his Wife, and Peter Drybutter. May 17.

ABout seventeen years since, Cornelius Beard bequeathed to his Sister, then in her Infancy, 250 l. to be paid at Marriage, or one and twenty years, and made one Andrew Drybutter and the Plaintiff Executors, and dyed, leaving his Sister young. Both the Executors made Probate of the Will, but the Plaintiff at the desire of the Sisters Friends did forbear to meddle with the Testators Estate, and left it wholly to Andrew Drybutter, the other Executor, who only did act in it. Andrew dying he made Elizabeth, his Wife, his Executrix. She possessed what there was of the first Testators Estate, and paid to the Defendant Cock's Wife, then the Wife of one Earl, 100 l. part of the 250 l. and the said Elizabeth Drybutter kept all the first Testators Books and Papers, and that by the desire of the said Legatee, and she dying she made the Defendant Peter Drybutter her Executor. The Defendant, Cock's Wife, libelled in the Spiritual Court against the Plaintiff for her 250 l. and had Sentence there against him for the whole, hanging this Suit, and yet hath by Answer confessed 100 l. part of the 250 l. to be paid.

The Scope of the Bill was to be relieved against the Spiritual Court, setting forth that by that Law the Plaintiff having joyned in the Probate would be charged with the Legacy though he did not meddle with the Estate; and that it was against Equity to charge one Executor with the Receipts of another. And the Bill charged that the other Defendant Drybutter had Assets both of Andrew Drybutter and Elizabeth Drybutters Estate, and if they had not paid as far as they had Assets of Beard's Estate the

the Defendant Drybutter, and not the Plaintiff ought to pay what was unpaid of the 250 l. Legacy.

The Defendant Drybutter confessed he had Assets of the said Andrew and Elizabeth, his Father and Mothers respective Estates, and insisted that they had fully administered Beard's Estate, and the Question was what Relief they ought to give the Plaintiff against the Sentence in the Spiritual Court.

The Lord Keeper declared, That the Judgments of the Ecclesiastical Court were as subject to the Equity of this Court, as Judgments in the Common Law Courts; and howbeit at Law one Executor is not liable to the Devastation of another, yet in the Ecclesiastical Courts, and by their Law, if an Executor prove the Will. they will charge him, though he do no further intermeddle to pay the Legacies: But Quære if that be not only where there is a failure of bringing an Inventory, Doctor & Stud. 67. And the Lord Keeper declared the Plaintiff is without Relief by Appeal from the Sentence, because the Judges Delegate must judge according to that Law, and so inclined to relieve the Plaintiff, but took time to advise.

Doctor & Student ut supra, A Law grounded on a Presumption, if the Presumption be untrue is not to be holden in Conscience; for Stabitur Præsumptio donec probetur in contrarium.

Sir Ralph Bovey against Skipwith. May 25.

IN 1651. Sir Francis Drake made the Plaintiff a Security out of the Mannor and Rectory of Walcham upon Thames. Afterwards in 1656. Drake made the Defendant a Security for Honey out of the Rectory only (the Defendant having no Notice then of the Plaintiffs Security which was for Honey also.) Afterwards the Defendant hearing of the Plaintiffs Security, buys in a Security precedent to the Plaintiffs, which one Beddingfield had both upon the Mannor and Rectory.

1. Question was, Whether the Plaintiff should be admitted to redeem Beddingfield's Security without paying off what was due to Skipwith? And it was ruled he should not. Vide Marsh and Lees Case.

Do

2. Question

A puisne Mortgagee buying in a precedent Incumbrance, shall hold against a middle Mortgagee, till both are satisfied.

Mortgage. Antea.

2 Vent. 337. 338.
Hardress, 173.
2 Chan. Cases 208.
20. 35. 217. 1
Chan. Cases. 36.
162. 163.

Where a Mortgagee buying in a precedent Security of the Lands in his Mortgage and other Lands, shall hold all against a middle Mortgagee of all those Lands, till all due to him on both Securities be satisfied.

2. Question was, Whether inasmuch as the Defendant's Security was only out of the Rectory, and the Security he bought in from Beddingfield was of both the Manor and Rectory, the Defendant should make use of Beddingfield's Security as to the Manor after that by the Profits of the Manor and Rectory Beddingfield's Debt was satisfied? And whether then the Plaintiff should not then be admitted to enjoy the Manor, his Security being as well of the Manor as the Rectory, and the Defendant to hold on by the Rectory till he was satisfied.

Wyld and Twisden were of Opinion, That after Skipwith had received what was due on Beddingfield's Security he should receive no more Profits of the Manor, but the Plaintiff to be let in to receive them, and the Defendant only to make use of Beddingfield's Security as to the Rectory to protect his Security of the Rectory. But it was resolved and ruled, that the Defendant should hold both the Manor and Rectory against the Plaintiff till all due to him on both the Securities was paid him. *Quære tamen.*

The Lord Keeper.

Rich against Sydenham May 26.

THE Plaintiff upon the Loan of 90 l. had gotten a Bond from the Defendant of 1600 l. for payment of 800 l. and Judgment thereupon. The Defendant in the Right of his Wife was entituled to certain Lands that were estated in other persons in Law in Trust for her.

Where the Contract is intire, and Inequitable Equity will not apportion Relief for part.

The Bill was to have those Lands subjected to the Plaintiffs satisfaction here, inasmuch as the Defendant was intitled to the Trust in the Right of his Wife.

But the Security being gotten from the Defendant when he was drunk, the Lord Keeper would not give the Plaintiff any Relief in Equity, not so much as for the Principal he had really lent; and so the Bill was dismissed.

The Lord Keeper.

*The Mayor and Aldermen of London, and Byfield
an Infant against Slaughter, the Executors of
the Plaintiffs Father. May 27.*

THE Bill was to bring in one that lieth out of the Jurisdiction of London, to come and give Security to the City for the Dyphans Portion, according to the Custom of the City. Rel. Abridgment 373. M. Pl. 3.

The Defendant by his Answer offers to do as this Court should direct, but being no Freeman, would not be subject to the City Orders.

The Recorder. This Court useth to assist the City in such like Cases, and on Petition useth to grant Subpœna's to persons to appear before the Mayor in his Court, and cited a President 28 Febr. 3 Jac. Fish and Cole's Case, of a Subpœna out of the Subpœna Office. The Chancery assistant to the Jurisdiction of Mayors Court.

Maynard for the Defendant. This Custom concerns the Country as well as the City, and must be tried by Verdict; and its inconvenient for Country Gentlemen to be put to give Security to the Dyphans Court by Recognizance.

The Lord Keeper decreed the Plaintiffs to try the Custom.

DE

Term. Sanct. Trin.

Anno Regis 23 Car. II.

IN

CANCELLARIA.

The Lord Keeper.

*Doctor Salmon against the Hamborough Company
by the Name of the Governour, Assistants and
Fellowship of Merchant Adventurers of England,
and divers particular Members of that Company
by Name in their natural Capacities.*

A course to recover a Debt from a Corporation that hath nothing whereby it may be summoned.

The Bill charged, that the Company were incorporated prout per Letters Patent, and had power to make By-Laws, and to assess Rates upon Cloaths (which was the Commodity they dealt in) and by Poll upon every Member to defray the necessary Charge of the Company, and that the Company had imposed Rates accordingly, as namely, 4 s. 6. d. upon every white Cloath exported, and divers others, and thereby raised 8000 l. per annum towards the support of the Common Charge of the Company, and that they had thereby got great Credit, and borrowed great Sums of Money by their Common Seal, and particularly the Plaintiff lent 2000 l. upon that Security many years since. And the Bill did set forth divers advantages they had

in Trade by being Members of this Corporation, which others wanted. And the Bill did charge, That the Company having no Common Stock, the Plaintiff had no remedy at Law for his Debt, but did charge that their usage had been to make Taxes, and levy Actions upon the Members and their Goods, to bear the Charge of their Company to pay their Debts, and did complain that they now did refuse to execute that power, and did particularly complain against divers of the Members by Name, that they did refuse to meet and lay Taxes, and that they did pretend want of power by their Charter to lay such Taxes, whereas they had formerly exercised Power, and thereby gained Credit; whereupon the Plaintiff lent them 1000 l. which was for the use and support of the Companies Charge, and so ought to be made good by them, and so prayed to be relieved.

Pascha 1656. this Bill was filed, and the Company served with Process, but would not appear, they having nothing by which they may be distrained: But divers particular Members being served in their natural Capacities, did appear and demur, for that they were not in that capacity liable to the Plaintiffs demands. 10 May 1656. On the Argument the Demurrer was allowed, and the Bill dismissed as to them, and that dismissal enrolled, and thereupon a Petition of Appeal was preferred to the Lords in Parliament, admitting that in the ordinary course of Proceedings in Chancery that Court could not help the Plaintiff. But in Causes of this nature the Lords House had given special directions to the Chancery to relieve, and it had been accordingly so done, and produced two Writs against Companies in London for that purpose. And to this Petition the Defendants particularly named did put in an Answer, Plea and Demurrer, and the Company, tho' several times summoned, did not appear. And upon debate of the Matters before the Lords at the Bar of the Lords House 20 January 1670. this Order was made.

Where the Chancery (according to rule) cannot relieve in a just Cause, the Parliament will give special direction for relief.

The matter upon the Petition of Salmon, Dr. of Divinity, exhibited to the Lords Spiritual and Temporal in Parliament assembled, against the Governors, Assistants and Fellowship of the Merchant Adventurers of England, commonly called the Hamburg Company, and Sir Charles Lloyd Baronet, Sir Anthony Bateman Knight, Thomas Smith, Richard Wyan, John Dogget, Henry Colliar, Henry Smith,

Smith, John Lethieulier, Christopher Pack, George Wytham, and others, Members of the said Company, and upon the Answer, Plea and Demurrer of the said Rowland Wyan, John Dogget, Henry Collier and John Lethieulier put in to the said Petition (the Governour, Assistants and Fellowships, tho several times summoned, not appearing) being heard at the Bar of this House, in presence of Counsel learned on both sides, the said Petition being on Appeal made from a Dismission in the High Court of Chancery, and the Petitioners Bill there. Their Lordships on reading the said Petition, the Answer, Plea and Demurrer thereto, and the said Dismission, and the Charter by which the said Governour and Fellowship are incorporated, and hearing what was alledged on both sides, do order that the Dismission for so much as concerns the said Company, be, and do stand reversed, and that the Lord Chancellor or the Lord Keeper of the Great Seal of England for the time being, do retain the said Bill. And that the said Court of Chancery shall issue forth the usual Process of that Court, and if cause be, Process of Distingas thereupon against the said Corporation; provided the said Process be served one month before the return thereof. And if upon return of the Process, the said Corporation shall not file an Appearance, or shall appear and not answer, the said Bill shall be taken pro confesso, and a Decree shall thereupon pass. But in case the said Corporation shall appear and answer within the time aforesaid, then the Court of Chancery shall proceed to examine what the Plaintiffs just Debt is, and shall decree the said Company to pay so much Money as the same shall appear to amount unto, with reasonable Damages. And in case the Corporation shall not pay the Sum decreed within ninety days after the service of the said Decree upon their Governour, Deputy Governour, Treasurer, Clerk or Secretary for the time being, then the Lords Spiritual and Temporal do farther order, adjudge and direct, that the Lord Chancellor or Lord Keeper for the time being shall order and decree that the Governour or Deputy Governour and the twenty four Assistants of the said Company, or so many of them as by the Tenor of their Charter do constitute a Quorum for the making of Levations upon the Trade or Members of the said Company for the use of the said Company, shall within such time as by the Lord Chancellor or Keeper shall be thought fit, make such a Levation

Leviation upon every Member of the said Company as is to be contributory to the Publick Charge, as shall be sufficient to satisfie the said Sum to be decreed to the Plaintiff in that Cause, and to collect and levy the same, and to pay it over to the Plaintiff as the Court shall direct. And such a Leviation is to be put in Writing and signed with the Hand of the Governor, Deputy Governor and Assistants of the aforesaid Company for the time being, and so many of them as by the Constitution of the said Charter do make a Quorum shall not make or return such Leviations, as aforesaid, the Lord Chancellor or Lord Keeper may issue Process of Contempt against them, as is usual against Persons in their natural Capacities. And if by the said time so to be limited by the said Court of Chancery the said Money so to be assessed shall not be paid, then and from thenceforth every Person of the said Company upon such a Leviation shall be made to be liable in his Capacity to pay his quota or proportion assessed. And the Lord Chancellor or Lord Keeper is to order or decree, that such Process shall issue against any such Member so refusing or delaying to pay his quota or proportion as is usual against Persons charged by the Decree of the said Court for any Duty in their several Capacities. And if the Total so returned and filed with the Register shall not amount to so much as shall be sufficient to satisfie the Sum decreed, with respect had to such Person as shall make it appear that they are overcharged, or ought not to be charged at all, Then the said Lord Chancellor or Lord Keeper for the time being may from time to time order that a new Leviation be made and returned into the Registers of the Court of Chancery, of such Sum as shall be sufficient, by way of Supplement for that purpose, to the payment whereof every individual Person is to be bound in such manner as aforesaid.

6 March 1670. The Lord Keeper on a Motion grounded on the Lords, ordered that the Dismission stand reversed, and the Bill stand revived, and that Process and other Proceedings issue as is thereby directed, and the service thereby directed be sufficient.

Accordingly the Treasurer and Secretary were served with a Distringas against the Company, and Copies of the Lords Order. The Sheriff returned Nulla bona; and no Appearance is made.

5 July

5 July 1671. Ordered the Cause be put into the Paper to be heard, and notice to be given to the Treasurer, Clerks and Secretary.

Pro confesso.

And now the 5th of July 1671. none appearing for the Defendants, the Court decreed the Bill to be taken pro confesso, and the Defendants to pay the Plaintiffs Debt, according to the Lords Order in Parliament.

*The Lord Keeper.
Justice Wyld.
Baron Windham.*

*The Lord Cornbury and Dame Flora his Wife,
formerly the Lady Backhouse, against Simon
Middleton, and others. July 1671.*

THIS Cause begins fol. 173. and being abated by the Plaintiffs Inter-marriage since the last Hearing, a Bill of Reviver was brought, and the Cause was reheard by the Lord Keeper, assisted with Justice Wyld and Baron Windham the third of March 1670. And the Case appearing to be as before, it was for the Defendants insisted, that the Contract made by Sir Hugh Middleton, with Bp. Bishop, did not bind, and that he being but Cestui que trust of a Surplus, had no power to sell, for that it was against the very essence of the Trust for him to have a power to dispose; and it would be a vain thing for any Parent to settle his Estate by way of Trust to prevent his Sons imprudent disposition of it, (which Sir William Middleton did here to settle his Estate with a design to keep a hand on his Son,) if notwithstanding his Son might have power to sell it when he pleased.

Cestui que trust of a Surplus hath but a bare possibility, and cannot sell.

The breach of an Agreement is not devisable.

Equity consists purely in Action and is only attainable by Process in a Court of Equity.

And it was farther insisted on for the Defendant, that if the Agreement with Bishop were binding, yet the Plaintiffs have no Title to have the benefit of that Agreement, for that the breach of an Agreement, as the Case was, was not devisable, and so the Plaintiff had no Title, Things in Action, as this Case is, being not devisable.

To which it was answered by the Plaintiffs Counsel, That Equity consists purely in Action, and is only to be come by, by the Process of this Court; and cited Cole and Moors Case, 5 Jac. Moors Rep.

Wind-

Windham was of Opinion that the benefit of this Agreement is not devisable: For Things that consist in Duity must be carried on in Duity, and Sir Hugh Middleton could not have enforced the Devisee, unless he had pleased to pay the Hony Bishop was to pay, and the remedy ought to be reciprocal.

The remedy of an Agreement ought to be reciprocal.

Wyld. Sir Hugh had an Equity to the residue after the Debt and Portions paid, and it was a Crime to sell a thing twice, and the Defendant was particeps Criminis, and so no Decree ought to be for him, but would have Sir Samuel Jones and the other Trustees for Sir William Middleton, in whom three parts of the four were vested in Point of Law, convey fourteen Shares to the Lady Cornbury and her Heirs.

The consent of the Heir makes good a void devise.

Lord Keeper agrees with Wyld that the clear Equity and Conscience was with Bishops Title, and that the Defendant Simon Middleton did interlope; but did much doubt upon the Devise. Yet forasmuch as Bishops Heir was a Defendant, and consents to the Devise by Answer, did Decree, that Sir Samuel Jones and the Sir Clerks to whom he had conveyed by Order of this Court, should convey by consent of the Heir of Bishop fourteen Shares to the Lady Cornbury and her Heirs.

The Lord Keeper upon the Hearing by himself alone in June 1670. being of Opinion to dismiss the Bill, and the Court being now divided in Opinion, the Defendant Simon Middleton petitioned for a Rehearing, and had a Hearing accordingly in July 1671. before the Lord Keeper, Master of the Rolls, Rainsford, Wyld and Windham.

And now upon this Rehearing, it was for the Defendant Simon Middleton insisted, that the Agreement with Bishop did not bind, for the reason supra; and farther, that the Agreement it self was imperfect, because the Hony was to be paid as the Trustees should agree, and they did never agree to it, but Henry Middleton the only acting Trustee did so soon as he heard of it, utterly disagree to it; and also for that the Agreement with Bishop was not pursued, for the Agreement with Bishop was in June 1657. and by that the Conveyances were to be executed in August next, but those not so much as prepared, nor any thing done in time, and but 250 l. paid and the Defendant Simon had paid above 15000 l. and had a Conveyance by Deed and Fine of the whole thirty six Shares (Bishops Contract being but for fourteen Shares executed above

Consent binds
the Party, but
shall not bind an
other.

twelve years since) and had been in the possession of the whole thirty six shares ever since; and that the Company of the New River had bought in an other Water-Work, from Sir Edward Ford, which was united to that of the New River, and mixt with it, and could not be distinguished, and that no distinct Account could be taken, and so it was impracticable to decree the performance of the Agreement with Bishop, nor could Sir Hugh have compelled him to perform the same. And if the City which was lately burnt had not been rebuilt, or any other loss had befallen the Water-Work, the said Sir Hugh could never have compelled the Lady Cornbury to pay the Money; and the Deets consent tho it may bind himself, shall not put a Bargain upon an other.

A Purchaser
with notice.

But it was for the Plaintiff insisted, that the Money Bishop was to pay, was enough to pay all the Debts and Legacies of Sir William Middleton, and thereby all the Trusts precedent to Sir Hugh might have been satisfied, and so Sir Hugh had a clear Title to the Surplus, and he was looked upon as the Owner, and the Contract with Bishop was in pursuance of the Trust, and he might by a Bill have compelled the Trustees to sell: And that the reason why the Agreement was not pursued in time, was because Sir Hugh Middletons occasions drew him to the Bath, and he writ a Letter to have it respite till he came back, which was not till after August. And the Defendant Simon was a wilful Purchaser, with notice of the Agreement, and Sir Hugh would have performed with Bishop, if Sir Hugh had not been perswaded by Simon; and Bishop did endeavour to take up Money of Sir George Prat for that purpose, and that these doings of Simon were against Conscience, and that in Conscience the first Agreement ought to be performed, and the Court ought to decree with, and not against Conscience.

What a Man
cannot transfer
he cannot ob-
lige by Articles.

Windham adheres to his first Opinion, (viz.) that the Bill ought to be dismissed, for he was not satisfied that Sir Hugh had any such Interest as he could contract for, nor is it well come to the Lady Cornbury, tho Sir Hugh might by a Bill inforce the Trustees to sell; for what a Man may do himself, is not transferrable in all Cases; and what a Man cannot transfer, he cannot oblige by Articles. If Sir Hugh could not grant, he could not by the Articles bind; his Interest is but a meer possibility contingent; in its creation its so. Sir William hath a power to charge,

charge, and doth so by his Will, and Sir Hugh could not dispose in his Father's life time, and what Sir Hugh should have is uncertain, for the Trustees might sell so much as to perform the precedent Trust. Nor was it intended by Sir William, that Sir Hugh should sell. If Sir Hugh had had the possession with this contingent Interest, it might have gone far; but Sir Hugh had no possession. If Sir Hugh had covenanted the Trustees should convey, Equity ought not to decree him to procure them to convey, but to leave the Covenant to his Covenant at Law; and by the Agreement the payment of the Bond is intangled, and doth not pursue the Trust; and Mr. Bishop could not enforce his Interest; nor is the Devisee bound to pay the Bond, nor shall he take it up or lay it down as he pleases. Cases that rest in Privy are to be carried on in Privy, and Strangers not to be engaged in it. The Heir comes in as improper as the Defendant, and that cannot help it.

Wyld. This is a Case in Equity and in Conscience, and this Court is to help that side that hath Conscience. The Case is on a Trust, and that proper here, and an Interest in a Trust is in Equity assignable or devisable. And if Land be conveyed for payment of Debts and Legacies, and what remains to be to the Heir, the Heir may dispose, and the Fine to Simon Middleton by Henry doth nothing. For it is but the Fine for one Tenant in Common which passeth but his own Share. Possibly a Fine and non claim may bar in Equity, but not here, for a Bill was presently filed. Notice is all in all in the Case; and it is against good Conscience for Simon Middleton to enjoy; and the Court must judge with Conscience, and not against Conscience. If this be an Interest its devisable; and its but Circuity of Action to bring the Heir to revive; for if he will not execute the Estate to the Devisee, he must bring a new Bill against him. And concluded, that there ought to be a Decree for the Plaintiffs, but no Action to be but of the 7650 l. to be paid by the Defendant, and to convey fourteen Shares of the thirty six Shares, and the mesne Profits to go against Interest.

Rainsford conceived the Plaintiff ought to be relieved, for Sir Hugh had an equitable Interest that might be transferred in Equity, tho it was in its creation contingent; and we are not to take our measure as it stood in the Creation, but as it stood when the Contract was made with Mr. Bishop, and he that may transfer may covenant, That

If *Cestui que* trust covenants that his Trustees shall convey, and he hath no means to force them to make such Conveyance, Equity ought not to decree him to procure them to convey, but to leave the Covenant to his Covenant. Cases that consist in Privy, are to be carried on in Privy.

A Fine of Tenant in Common passeth but his own Estate.

Circuity of Action.

Interest to be considered as it was at the time of the Contract, and not at the time of its Creation.

his Trustee shall do it. And Simon Middleton injuriously, comes in with notice, and threatens Sir Hugh into this Contract, and conceived Bishop might devise, and concluded as Wyld did.

The Master of the Rolls agreed with Rainsford and Wyld and looked upon the Agreement with Bishop to be in pursuance of the Trust.

The Lord Keeper when he first heard this Cause, was of Opinion to dismiss the Bill; but that was on a mistake; for he did conceive that all the Trustees had conveyed to Simon Middleton, whereas it seems that Henry Middleton (who was but one of the Trustees) had conveyed to the said Simon. Its a cause of great consequence, and the Trustees were trusted as well for Sir Hugh as the others, and conceived the Plaintiffs ought to be relieved. Bishop hath the first Agreement, and Simon Middleton the second, and Equity ought to decree with the first, and the Fine and Conveyance carries no more from Henry than his fourth part, and carries Sir Hughs Equity no farther; and so decreed, That out of the three parts remaining, fourteen shares of the thirty six parts shall be conveyed by the six Clerks to the Lady Cornbury and her Heirs, and no account of mesne Profits, but those to go against Interest. And as to Fords Water-Work, if it can be severed it cannot be taken into the Decree; but if it cannot, there must be an allowance for it, and so it was decreed accordingly. And whereas the said thirty six parts were charged with a Rent of 500 l. per annum to the Crown in Fee. and 100 l. per annum to Henry Middleton for Life, and Sir Hugh in his Agreement with Bishop, had covenanted to discharge the fourteen shares he had agreed to sell Bishop from those Rents. It was farther decreed, that the Plaintiff should enjoy the fourteen shares discharged of those Rents, and that the other twenty two shares should be subject to the Plaintiffs indemnity therein, notwithstanding it was insisted, that Sir Hughs Covenant to discharge the fourteen shares of those Rents was merely personal, and did not, nor could charge the whole Rents upon the twenty two shares.

Hardr. 87. Com.

D E

Term. Sanct. Mich.

Anno Regis 23 Car. II.

I N

CANCELLARIA.

The Lord Keeper.

Washborn against Downes. December 5.

THE Question was, Whether a Recovery by Cestuy que Trust should bar as in a Case of an Estate at Law.

The Court held clearly, that a Fine of a Cestuy que Trust will bar the Estate, but not the Remainder over to another; because a Fine will pass or extinguish all Right or Title which the Cognizors have in the Land. But it was doubted, whether by a Recovery of Cestuy que Trust any thing be barred: For that if Tenant in Tail at Law suffer a Recovery, legal Exceptions may be taken to it; but if a Recovery may be in Equity, all those Exceptions are taken away; and as to the Case of Goodrich and Brown, fol. 49 it was said, that was without a President; and the Plaintiff in that Case doth not rely on his Decree; but the Matter was afterwards compromised. And it was a Question in Bachursts and Emanson's Case; and that Case was agreed.

The Court in the Principal Case took time to advise, and advised the Parties to agree. And in the Debate of this Case, it was said that a Perpetuity is, where if all that have Interest, join, and yet cannot bar or pass the Estate. But if by the concurrence of all having the Estate Tail may be barred, it is no Perpetuity.

By the Fine of a Cestuy que Trust in Tail, the Entail may be barred.

The definition of a Perpetuity.

Sir

Sir Robert Atkins against George Mountague.

There was a Tryal at Barr touching the Title of the Master of the Hospital of St. Katherines which the Plaintiff claimed by a Grant from the Queen Consort that now is; and the Defendant held and enjoyed by two Grants, one from Henrietta Maria, the Queen Dowager; another from his Majesty that now is, before his Marriage.

Upon the Evidence divers Points arose.

Monasticon
2d. part 460.

1. The Plaintiffs Title was founded upon the Charter of Queen Eleanor, Dowager of H. 3. (which see in Dugdale) who added to the Endowment of this Hospital most part of the Possessions,

Reservatis nobis & Reginis Angliæ nobis succedentibus plenam potestatem providendi Magistrum, &c. Volumus etiam, quod omnes Reginae nobis succedentes Jus Patronatus habeant, &c.

which was confirmed by the subsequent Charters of E. 2. and E. 3.

2 Keb. 808.
Co. Lit. 8. Princes Case.

2. Against the Foundation of this Title the Defendant's Counsel objected, That a Limitation of the Patronage Reginae succedentibus by Charter is void, for such a desultory kind of Inheritance cannot be limited but by Act of Parliament, just as the Duchy of Cornwall was by Act of Parliament in 11 E. 3. limited to the Kings eldest Son for the time being.

Difference between an Advowson *in esse* and the Patronage of an Hospital newly created

But Hale Chief Justice and whole Court resolved to the contrary; for they took a Difference between an Advowson *in Esse*, and the Patronage of an Hospital newly created; for the Land of an Advowson, 'tis true, no desultory kind of Inheritance can be limited without Act of Parliament, because then he who had Right could not always know against whom to bring his Action: But of the Patronage of an Hospital newly founded there can be no precedent Right, and therefore at the very first Institution it may be limited as the King pleases, like the Case of a Rent *de novo*.

Though the several Patents were produced on each side, wherein the Master of the Hospital had been granted in Reversion, yet resolved by Hale, and the whole Court, that all such

such Grants were void : For the Master of that Hospital, when he is seized in Fee in Right of the Hospital, and of an Estate in Fee simple, there can be no Reversion to grant. Therefore this Case is not to be compared to the Grant of an Office in Reversion, but is more like the Case of a Prebendary or a Donative, which cannot be granted in Reversion.

Master of an Hospital, Prebendary, Donative not grantable in Reversion.

3. Then it was objected by the Plaintiff, that the Defendant's Grant from the Queen Dowager was void, because there was a former Grant which the Queen Dowager made to one W. H. Mountague who was alive at the time of the Grant to the Defendant. The Defendant shewed that the Grant to H. Mountague was void, because it was Habend' post mortē Sir Julius Caesar, and so a Grant in Reversion, which was held a clear Answer.

4. It was resolved, That in a Patent which grants the Mastership of an Hospital, the words are not to be so precisely examined as in a Patent of Land or other Office ; for in this Case it is sufficient, if there be Words of Nomination only, because the Patentee is not in by the Patent alone, but by the original Constitution upon the foundation.

Diversity between the Grant of the Mastership of an Hospital and a Patent for Land.

5. It was said by Hale, that though here the Question be touching the Interest of a Queen Dowager in the Patronage when there is no Queen Consort, yet it seemed to him that if there be a Queen Dowager and Queen Consort both at the time of the voidance of the Hospital, the Queen Dowager shall present.

6. If the Dowagers Grant be good, when there is a Queen Consort, it is much more so when there is none ; and if there could yet remain a scruple, the Kings Grant and Confirmation clears it ; for if there be no Consort nor Dowager doubtless the Kings Presentation is good : And this alone is sufficient to support the Defendant's Title.

The Plaintiff replied, That the Kings Presentation in such Case was good only by way of a provisional supply until a Consort come, and then was to cease.

Which all the Court denied ; for the Master by his Incumbency gains a Fee simple, which cannot be determined by the determination of the Plaintiff's Interest ; as in the Case of the Dutchy of Cornwall : If the King let the Land, the Lease is void when the Prince is born. But if he present to an Abbotson, the Clerk continues.

Wherefore the Plaintiff seeing the Opinion of the Court against him, became nonsuited.

D E

Term. Sanct. Hill.

Anno Regis 23 Car. II.

I N

CANCELLARIA.

*The Lord Keeper.
Justice Twilden.*

Sufanna Holford *against* Holford. Febr. 9.

THIS Cause having been formerly heard, and the Plaintiff claiming under Articles of Marriage, between her Father and Mother, whereby in consideration of a great Portion, her Father did agree to settle the Lands in question on himself and his Wife and their Issue (whose Issue the Plaintiff is) buttho' he lived some years after, did not execute any Conveyance. And the Defendant being the Plaintiffs Fathers Brother, claimed by a Deed of Intail made by the Plaintiffs Father ten years before the Articles (whereby for failure of Issue Male on his own Body the Lands were limited to the Defendant) It was directed to a Tryal on this Issue, Whether the Deed by which the Defendant claimed, was fraudulent, or not, and the Defendant to admit the Plaintiff a Purchaser, that the Fraud might come in Issue. A Tryal was had, and it was found against the Plaintiff.

Trial of a Deed
whether fraudulent.

And

And now for the Plaintiff it was played there might be a new Tryal, and that the Defendant might at such Tryal admit the Plaintiff had a Conveyance: For as it stood upon Articles the Defendants Conveyance could not be taken to be fraudulent against the Articles, nothing passing in Law thereby, and yet it would be fraudulent against a Conveyance.

A Conveyance cannot be fraudulent against Articles without another Conveyance be executed in a legal Course.

And therefore it was insisted, the Defendant ought to admit the Plaintiff had a Conveyance, though not such a one as to bar the Estate Tail, yet a Conveyance by way of Lease and Release; as if the Plaintiffs Father was seized in Fee, and then the matter of the Fraud would properly come in Issue, which the Court denyed, and so dismissed the Bill. And in the arguing of this Cause it was admitted, that every voluntary Conveyance is prima facie fraudulent against a Conveyance for Consideration.

Tryal of fraudulent Conveyance.

The Lord Keeper.

Chief Justice Hales.

Justice Wyld.

Justice Windham.

Chaumond Roscarrick Esquire against Barton.
February 21.

MAY 12. 10 Jacobi, Charles Roscarrick on his Marriage with Dorothy his Wife, settles the Lands in Question (inter alia) on himself for Life, Remainder to Dorothy for Life, Remainder to the Heirs Males of his own Body; he hath Issue Charles his first, and the Plaintiff his second Son, and dies; Dorothy marries with one Greenvil, and they enter on the Lands in Question as the Joynture of Dorothy.

Charles, the Son, 15 Novemb. 13 Car. 1. by Deed, Fine and Recovery for 800 l. conveys the Lands in Question to Greenvil and his Wife, to the use of Dorothy for Life, Remainder to the use of Charles and his Heirs, till he fail to pay several Sums at several days, amounting to 800 l. and after default of payment of any Sum to Greenvil and his Heirs.

ff

After-

Afterwards 14 Car. 1. Charles on his own Marriage settles the Lands in Question, inter alia, to himself for Life, Remainder to Margaret his Wife for Life, Remainder to his first and other Sons in Tail, Remainder to the Plaintiff in Tail. In 1650. Greenvil assigns his Estate which was for the Security of the 800 l. and was forfeited to the Defendant by the consent of Charles. In 1656. upon a Bill exhibited by the Defendant in Chancery against Charles, It's decreed Charles shall pay the Defendant what's due to him (viz.) 1250 l. of the now Defendant, Plaintiff in that Cause, to hold against Charles and all claiming under him. Charles dies without Issue Male, Dorothy lives till 1668. then the now Plaintiff exhibits his Bill to redeem, and alledges that the Decree against Charles was by consent, and that it was agreed between Charles and the Defendant, that notwithstanding the Decree, it should be still a Mortgage in the Defendants hands and be redeemable upon payment of Principal and Interest, and however that the Plaintiff being no party to that Decree, and Charles but Tenant for Life, that Decree could not bind the Plaintiff. And as to the pretence of an Agreement between Charles and the Defendant, that notwithstanding the Decree the Estate should remain still a Mortgage in the Defendants hands, there was no proof of any such Agreement or Consent, but only told Charles he would come to an account; but there being Dealings and Accounts between the Defendant and Charles, it was declared by the Lord Keeper (who first heard this Cause in July 1671.) that general words not particularly applied ought not to make a Decree; for if they did, there would be no end of Suits. But then it was insisted for the Plaintiff, that he being no party to the Decree was not bound thereby, and that he had an Equity to redeem, and that the Mortgage was not to be taken to be more ancient than from the time of the Assignment to the Defendant, for that an Account being then stated with Greenvil, and he paid off, there was no Account to be precedent to that, and so could not be taken to be elder than 1650. and that so the Plaintiff ought to be admitted to redeem, and the rather, for that the Defendant had notice (which was admitted) of the Deed 14 Car. 1. by which the Plaintiff claims before he took the Conveyance from Greenvil; and whether the Plaintiff should redeem the Lord Keeper doubted, but took time to consider.

And

General Words cannot be applied to particulars.

An old Mortgage assigned to another, ought to be taken as a new Mortgage from the time of the Assignment.

And now 21 Feb. 1671. this Cause was finally heard before the Lord Keeper, assisted with Chief Justice Hale, Mr. Justice Wild and Baron Wyndham.

It was insisted for the Defendant, the Plaintiff was no Party to the Deed of the Mortgage, and that the Deed of 14 Car. 1. by which the Plaintiff Chaumont claimed, howbeit it was made in consideration of Charles his Marriage, was to Chaumont the Plaintiff purely voluntary. And that albeit a voluntary Conveyance would pass an Equity of Redemption, yet in this Case where the Plaintiff claims an Equity by way of Intail, it ought not to be countenanced in Equity; for that the consequence of it would be to make an Equity of Redemption perpetual. If a Mortgagee after a Mortgage made may make himself Tenant for Life of that Equity, with Remainder in Tail, as here. Remainder for Life, &c. which being but a Right of Action, a Right to a Bill in Equity ought not to be so intailed, and that this was not such an Inheritance as was intailed by the Statute de donis, &c. but being a Right of Action vested in the Father, with Remainder to his first and other Sons before Chaumont, there was no need to have made Chaumont Defendant to the said Decree: And Dorothy who was the Tenant for Life lived till 1668. so that the Mortgage was all that time but of a dry Reversion, and Margaret the Wife of Charles, who lived until very lately, and who had a Title of Redemption precedent to the Plaintiff, did not seek to redeem.

Wyndham was of Opinion as this Case was, that the Plaintiff ought not to be admitted to redeem.

Judge Wyld. There is no Fraud in the Settlement 14 Car. 1. and a Decree against Tenant for Life will not bind him in the Remainder in the Case of an Estate at Law; and he did not see why it should bind in Equity, and so he conceived the Plaintiff was relievable.

Chief Justice Hale. By the Growth of Equity on Equity, the Heart of the Common Law is eaten out, and legal Settlements are destroyed; and was of Opinion, there is no colour for a Decree. In 14 R. 2. the Parliament would not admit of Redemption; but now there is another settled course; as far as the Line is given, Man will go; and if an hundred years are given Man will go so far, and we know not whither we shall go. An Equity of Redemption is transferrable from one to another now, and yet at Common Law if he that had the Equity made a Feoffment, or le-

A voluntary disposition of an Equity of Redemption is not to be favoured.

An Equity of Redemption intailed tends to make it perpetual.

An Equity of Redemption not intailable within the Statute.

Equity on an Equity.

Equity of Redemption carried too far.

Antiquity a
Cause to deny
Redemption.

A Decree to fore-
close Tenant in
Tail from re-
deeming, con-
cludes his Issue
and the Re-
mainders.

A difference be-
tween parties to
the Mortgage
coming to re-
deem and
Strangers.

bied a Fine, he had extinguished his Equity at Law; and it hath gon far enough already, and we will go no further than Presidents in the matter of Equity of Redemption; which hath too much savour already; and concluded there should be no Decree for the Plaintiff in respect of the Antiquity, and if he will redeem, he must come in time. It is but just to foreclose for not coming in time: It's just to deny Redemption if he come not in time. And a Decree to foreclose a Tenant in Tail shall bind his Issue in an Equity of Redemption, because that is a Right set up only in a Court of Equity; and so may be here extinguished; and the Estate moved from Charles to the Mortgagee, and not from the Plaintiff; and Charles was the visible Possessor and Owner. And it's a great soze, that Mortgagees are but Bayliffs; and the Limitation to Chaumond was but voluntary, and so the Plaintiffs pretence is not to be supported against a Purchaser, for so a Mortgagee is; and here its made absolute by the Decree; and if there be divers Remainders of the Equity, there is no reason to make them all Parties.

The Lord Keeper concurred with him, and said he, it goes current, that if a Mortgage be twenty years old, the Mortgagee shall have no Interest on Interest: But herein he is not satisfied, especially in this Case, where the Defendant could not get into possession by reason of the Estate for Life to Dorothy, who lived till 1668. and was clear of Opinion that the Plaintiff ought not to be admitted to redeem. And made great difference between Parties that come to redeem, who are no Parties to the Mortgage, and those that are Parties to the Mortgage. And so the Bill was dismissed.

The Earl of Athol in Scotland against the Earl of Derby, and the Administrator of the Countess of Derby.

JAMES Earl of Derby Tenant for Life makes a Lease for one and twenty years to his Wife of the Isle of Man, for Provision for younger Children, and dies; she agrees with the Earl of Athol on the Marriage of her younger Daughter the Lady Emilia, to give him 5000 l. Portion, and that he shall have the Isle of Man valued at 1000 l. per annum for five years to pay it. Charles Earl of

of Derby his Son, the Defendant, opposed this Lease, being made by Tenant for Life, and between Baron and Feme, but by the Mediation of certain Lords in Parliament, Earl Charles and his Mother came to a new Agreement in the year 1660. That he shall have the one Moiety of the Profits of the Isle, and he the other. In 1661. They came a new Agreement, that he should in lieu of the Agreement pay his Mother 500 l. per annum, and in the close of the Deed appoints his Receiver for the Isle of Man to pay it. All these Agreements were made by the Countess on behalf of the Earl of Arhol, to enable him to receive the 5000 l. and then the Countess dyes.

It was decreed by the Master of the Rolls, That the Earl of Arhol shall have his 500 l. against the Earl of Derby. and his person to be charged, and the Earl of Arhol shall not be forced to the Isle of Man, which is the place originally charged; for by the last Agreement he is to pay 500 l. per annum absolutely, and in lieu of the Profits let the Earl of Derby make what he will of them; and the appointment of the Receiver to pay it is but directory, and if the Receiver do not pay it, the Earl must.

Maynard and others of the Plaintiffs Counsel held that the Court could not by any Decree bind the Isle of Man; nor if they should decree it, could they execute the Decree there, it being out of the power of any Sheriff. They also held that the Letter of Attorney being determined by the Countess's death, that the Court would not have made a Decree for the Earl, though her Administrator is Defendant, unless in the Case of a Marriage Agreement, and that it was proved those Agreements were made on his behalf. Afterwards Sequestration was awarded against the Earl of Derby.

The Isle of Man
out of the power
of the Court.

1 Roll. Abr. 373.
M. Pl. 1.

Whereupon a Question arose, What time of Privilege a Peer hath (viz.) whether twenty or ten days before and after Session of Parliament?

The Lord Keeper sent to the Lord Hollis and others to advise in it, and they produced two Orders in the House of Lords, whereby it appeared they declared their Privilege to commence from the Teste to the Writ of Summons for their first coming to Parliament. And that upon every Session and Prorogation their Privilege is for twenty days after such Session. And it is said in the Orders, that it is a sufficient time for them to come from all

Privilege of
Peers in Parlia-
ment when it
commences and
when it ends.

all parts of the Kingdom, and to return, and are in those Orders desired to take notice of it and of the reason of it.

These Orders are, the one of the 24th of May 1624. the other of the 27th of January 1628. entered into the Journal of the Book of the Lords House.

But it is said, the Commons never agreed hereto and therefore think themselves not bound by it.

Note, This Sequestration was executed accordingly; but the Earl of Derby soon after dying, and the Estate being intailed, the Earl of Arhol lost the rest of his Wilkes Portion.

D E

Term. Sanct. Hill.

Anno Regis 25 Car. II.

I N

CANCELLARIA.

*The Lord Keeper Finch.**Hayes against Hayes.*

A Seised in Fee, deviseth to his Wife, on Condition that he pay to the Daughter of A. 500 l. at her Age of sixteen years, and on default, that he should enter and raise it; the Wife deviseth to his Mother for Life, and afterwards to his Brother in Fee, and dies; the Mother enters, the Daughter is under Age, and the Brother having the Reversion and Inheritance, exhibits his Bill to have the Mother pay a part of the 500 l. He having part of the Estate as Security for Life.

It was objected, that the Daughter is not of Age, and so this Bill is quia timet only; and it may be that the Mother may live till the Daughter is of sixteen, and then the Daughter may enter and raise, and so the Brother, who is the Reversioner, should not be grieved; and the Court would be vexed with vain Suits if any one might be admitted to sue only quia timet, to prevent a remote Possibility.

But the Court answered, that Suits quia timet only were proper in Law and Equity: Its Law of a Warrantia Chartæ in Equity, as where A. grants a Charge of 100 l. per annum in Fee, and deviseth to B for Life, Remainder to C. in Fee, and dies, C. exhibits his Bill to compel the Tenant for Life to pay the Arrears, else all will fall on the Reversioner; and this hath been decreed; and the

Tenant for Life shall contribute with the Reversioner toward the Arrears of a Charge or Mortgage.

Suits quia timet in Law and Equity.

Post 271.

the first Cause about Contribution was between and where A. had mortgaged the Manor of Guilford for 2500 l. and then devised to B. for Life, the Remainder to C. in Fee, C. preferred his Bill to force B. to pay his Share of the Mortgage Money, and it was decreed that he should: And there have been twenty Cases since of the like nature. So in the principal Case there being a Demurrer to this Bill for the Causes aforesaid, the Defendant was ordered to answer; and then Sir John Churchil moved, and said for the Defendant, that she should prove that it was the intention of the Debtor here that she should pay nothing, which was not answered, but was admitted to be material.

The Lord Keeper Finch.

Butler *against* Bernard. February 24.

A Term aliened by an Administrator shall go to his Executor and not to the Administrator *de bonis non.*

A Administrator makes a Mortgage of the Intestates Term, and makes A. his Executor, and dies; B. takes out Letters of Administration *de bonis non* to the first Intestate, and claims the Residuary Interest and Trust of the Term, and prays that he may have the benefit of Redemption. But the Court decreed the benefit of Redemption to A. the Executor of the first Administrator, who had aliened the whole Estate in Law of the Term, and was not possessed in *auter droit*, nor of any part of the Interest thereof, but in his own Right; and so it shall go to his Executor, and not to B. the Administrator *de bonis non.*

D E

D E

Term Sanct Mich.

Anno Regis 25 Car. II.

I N

CANCELLARIA.

*The Lord Keeper Finch.**Colonel Doyly against Perfull. October 25.*

The Wife having assigned her Term in Trust for her self before Marriage, and then the Husband without joining with the Trustees does mortgage the Trust, and the Husband being dead, the Mortgagee being Plaintiff, exhibits his Bill to have the Lands conveyed to him, or that they should redeem; and the Court dismiss the Plaintiffs Bill; for since Queen Elizabeths time it hath been the constant course of this Court to set aside and frustrate all Incumbrances and Acts of the Husband upon the Trust in the Wifes Term, and that he shall neither charge or grant it away: And tis the common way of Proceeding for the Joyntures of Women, to convey a Term in Trust for them upon Marriage, that it may be out of the power and reach of the Husband; neither shall he forfeit it by Outlawry or Felony, if for Joynture or in pursuance of Articles of Marriage, or being the Wifes Term it is assigned before in Trust, as here, or if on other good consideration it be assigned. But if it be an Assignment after Marriage by the Husband in Trust for the Wife, this is voluntary and fraudulent against Purchasers, and this was the great Exchequer Chamber Case.

The Husband cannot grant or charge the Term of the Wife in Trust.

Nor forfeit it for Outlawry or Felony.

Aliter of Assignment after Marriage by the Husband.

Watts v. Thomas, 2 P. W. 364.

G g

D E

D E
Termino Paschæ

Anno Regis 26 Car. II.

IN

CANCELLARIA.

Davis *against* Curtis.

Ant 16. 24.

Nota, The Bond determined the parol Agreement.

No relief above penalty in Equity.

Bill to discover Assets, and does not charge that any Goods came to his Hands, ill.

DAVIS Executor of C. employed as a Master of a Ship by the East-India Company covenants with them that he should pay a certain Wage for every Cloath carried, &c. in the Ship, and took the Defendant to be his Mate, who made an Agreement *mutatis mutandis*, with Davis, and gave a Bond of 50 l. for due performance on his part; but he without Davies his knowledge carried so many Cloaths as the Wage came to 70 l. which the Company deducted out of the Masters Wages, and the 50 l. Bond would not satisfy, and therefore prayed relief and discovery of the Testators Estate.

The Defendant demurred. 1st. The relief of more than security by Bond, not proper in Equity. 2d. That part of the Bill which stands for discovery of Assets was ill, because the Charge in the Bill was not positive, that Assets, or that any Goods came to the Defendants Hands; and ruled in both Points accordingly.

Cook against Bampffield. May 19.

William Pierce Prebend of Rutland-Denham leased the Rectory of R. to Thomas Bampffield, George and Edward Bampffield, in Trust for Thomas, who conveyed his Interest to Sir R. P. but G. B. was no Party, but beyond Sea. The Prebend Lessor dyeth, Tisdell his Successor (on a Surrender to him of the former Lease produced to him, but G. B. sealed it not, so that in Law it was void against G. B.) makes another Lease to Sir R. P. for three Lives, which Lease was for divers years enjoyed till all those three Lives dyed. Tisdell being dead, Cook takes a Lease of Duncomb, who succeeded Tisdell, for 400 l. fine. George Bampffield comes from beyond Sea, and sets on foot his Title for a third part. The Matter was by Reference put to Arbitration (the point of Trust or no Trust being before by direction tryed by a Verdict for Cook, that G. B. his Name was used in Trust for Tho) and G. B. having by Verdict at Law recovered one third part of the Premises, the Arbitrators awarded, that G. B. should permit Cook to enjoy the said third part, paying 16 l. yearly to G. B. during his Life. G. B. dyed; the Plaintiff exhibits a new Bill against Edward B. reciting the former, and prays Relief.

Duncomb dyed, Aston succeeds in the Prebendary; and before the last Bill Aston for 120 l. makes a new Lease to Edward B. for three Lives, yet in being. Edward B. was bound to Cook that G. B. should perform, which in all George his time was on all sides executed. Aston received the Rents of Cook after Duncombs death: 27 Novemb. 23 Car. 2. It was decreed that Edward and George B. should pay to Cook all the Profits received, deducting the 16. l. per annum, and that Edward B. should assign his Lease to Cook for three such Lives as he should name: And on a Bill of Review this Decree was confirmed by the Lord Keeper Finch 10th of May instant, Ellis and Littleton concurring.

The Objections against the Decree were, First That the Lease of Duncomb was not good in Law, being of the whole in Possession and Reversion, when at the making thereof George B. was Tenant for Life for one third part; which was not much denied, and being avoided by Act of Parliament this Court might not supply it; and Aston

Lessee of a Prebend mortgageth his Lease and after the day pays the Money, and then surrenders, and takes a Lease from the Prebend, he hath good Equity against the Mortgagee. If the Prebend dye, Equity shall not make the second Lease good against the Successor.

Chancery cannot help in Equity against an Act of Parliament.

the Successor is not bound by any Transaction of the Account made in the time of his Predecessor against an Act of Parliament. And it was as free for Edward B. to deal for an Estate with Aston, the Prebend as for any other Man, and that if there was any Equity to support the Lease against the Lessee or his Assigns, or against Duncomb Predecessor to Aston, that Equity should not bind Aston. But Case the Lessee of a Prebend or Bishop should mortgage his Lease or part of it, and after the day pay the Money, and then surrender and take a Lease from the Prebend; he hath good Equity against the Mortgagee; but if the Prebend dye, this Equity shall not make the second Lease good against the Successor against the Statute which binds all Men and hath no saving of such Rights of Equity; and the Chancellor may not add to a Statute to make a saving which the Statute hath not made. An Infant bound by Statute of Fines should not have been helped in Equity.

But notwithstanding the Decree was confirmed; for by the Surrender of Tho. who was Cestuy que Trust, the Lease in Equity was avoided as to the then Prebend, and therefore shall never be set on foot against a Successor. Duncomb takes 400 l. fine and resigns when there can no more fine be made, and Aston would now set on foot the Statute and a new fine, which appears against the Practice.

The 2d Objection. The Purchaser from T. B. viz. R. P. took a new Lease for three Lives, whereby the Purchaser had the full benefit of his Purchase, and those new Lives being now all dead, it is no reason that Cook should set on foot the Interest of the old Lease again.

The Lord Keeper. No; shall Aston, nor Edward B. The Decree was confirmed.

The Mayor and Aldermen of London against the Earl of Dorset. May. 30.

Examination after Publication and after Hearing.

UPON a Commission of Charitable Uses, The Question on Appeal was, Whether certain Houses were part of Bridewell belonging to the City for Relief of the Poor, or a part of Dorset-House; which Point was referred to Law to be tryed, and then to report.

A. B.

A. B. moved for a Commission to examine an old Will-
ness 80 years old, who was not discovered till now, and
unable to travel. If he was able to travel he would be
examined at the Tryal; and the Publication on Hearing
was past, yet the Question being of Free hold, and not
properly tryable at Law, it was reason that the Testimony
should not be lost, and possibly the Land thereby. The
Mortgage was opposed, because of Publication.

Ant. 25. 73. Post
236. Kelm. 96. a.
b. 100. a. Hard.
180.

The Lord Keeper. The Rule of Non-examining after
Publication hath been strict in this Point; but the Court
is the Judge, and the Examiners, here or by Commission,
are ministerial to the Court; so he ordered a Commission
and Examination.

Burges against Burges.

Thomas Burges after his intermarriage with Elizabeth
Hughes his first Wife, by Lease and Release dated
24 July 1669. in consideration of his Wives settling her
Lands upon him and his Heirs (which was done by Fine)
conveys divers Freehold Lands to the use of himself for life,
and after his decease to the use of his Wife Elizabeth for
her life, and after the determination of the said Estates, then
to the use of the first Son of the said Thomas on the Body
of the said Elizabeth, to be begotten, and the Heirs of the
Body of such first Son; and for default of such Issue, to
the use of the 2d, 3d, 4th, 5th, 6th, 7th, and every other
Son and Sons of the Body of the said Thomas, on the
Body of the said Elizabeth, to be begotten, successively,
and the Heirs of the Body of such Son or Sons; and for
default of such Issue, then if at the death of the said Tho-
mas the said Elizabeth shall be enseint with Child, then to
the use of Skinner and Clark, Trustees, and their Heirs,
untill the Birth of such after-boyn Child or Children; and if
it be a Son or Sons, then to the use of such Son and
Sons, and the Heirs of the Body of such Son and Sons;
and for default of such Issue, to the use and behoof of all
and every the Daughter and Daughters of the said Thomas
Burges, on the Body of the said Elizabeth, begotten or to
be begotten, as well which shall be boyn, as which she the
said Elizabeth shall be enseint with at the time of the death
of the said Thomas, and the Heirs of the Body of such
Daughter

Limitation of a
Term being a
remote Trust,
and tending to a
perpetuity, void.

Daughter and Daughters, and for want of such Issue, to the use of the right Heirs of Thomas and Elizabeth for ever.

Thomas Burges being likewise possessed of other Lands by two Leases for ninety nine years, determinable upon three lives, by an other Deed bearing date with the fore-mentioned Deed of Settlement, for the consideration therein mentioned did assign the said Leasehold Lands to Skinner and Clark, two of the Defendants, in Trust to the several intents and purposes, and for the uses which are limited and declared of and concerning the said Lands of inheritance of the said Thomas Burges in and by the said Indenture bearing even date with the said Deed and Assignment.

Thomas Burges had no Son by the said Elizabeth, but had one Daughter, which is now the Defendant Elizabeth, who was alive at the time of the making of the said Indenture, being 21 Dec. 1668. Thomas Burges survived, and after married Ursula a second Wife, by whom he had Issue two Sons and one Daughter, and died Intestate, and Ursula his Wife is Administratrix.

Qu. Whether the Trust of the said Leases doth belong to Elizabeth the Daughter, or the Administratrix?

After this Cause was stated, and the Lord Keeper Finch had took time to consider it, he declared that the Limitation (because it was a remote Trust, and tended to a perpetuity) to the Defendant Elizabeth, as Daughter of Thomas Burges, was a void Limitation, and on that reason decreed the two Leases to the Plaintiff as Administratrix to Thomas Burges.

D E

Term. Sanct. Trin.

Anno Regis 26 Car. II.

I N

CANCELLARIA.

Anonymus July. 2.

If the Bill exhibited be grounded on the loss of a Bond, Where Oath must be made of such loss; because that such must be made of the want of a loss is that which intitles the Court to jurisdiction of the Cause, else the Party has his remedy at Law. Deed, Bond, &c. No Oath is required of loss of them, but only ut supra, where the Oath doth intitle the Court to Jurisdiction. By the Lord Keeper.

Organ against Gardiner. July 2.

An Original Bill to execute a Decree of Lands against a Purchaser, who claimed under Parties bound by that Decree, was allowed good on Demurrer thereto, by the Lord Keeper.

An Original Bill to execute a Decree against a Purchaser, claiming under parties bound thereby.

Ashcombs Case. July 15.

*Ant. 169. 170.
2 Chanc. Caf. 73. 7.*

THE Bill was exhibited by the Plaintiff, a Feme Covert and her Friends, against her Husband and two others, Mascall and S. The Case was, That the Plaintiff being a Dutch Woman brought 4000 l. Portion to her Husband, who agreed with her before Marriage to leave a compleat Maintenance for her Self and her Children, not expressing what; The Marriage took effect, but he declining in Estate, her Friends called on him; and he thereupon assigned certain Bonds, wherein M. was bound to him; and a Letter of Attorney was made after to S. to receive the Money upon the Bonds, who received the Money of him. The Bill was to have the Money from M. and S.

Plea.
Notice.

Mascall by Plea sets forth the payment to S. and that he had no notice of the assignment of the Bonds. And this was allowed a good Plea for Mascall. But S. pleaded a Letter of Attorney, and payment to him on good Consideration, but did not deny notice; and therefore his Plea disallowed, and the Agreement and Assignment of the Debt in Holland where such Agreement between Husband and Wife, and such Assignment of Bonds are good, and they are to be allowed here by the Lord Keeper.

Assignment of
Bond in Holland
according to
their Custom al-
lowed here.

Anonymus. July 15.

Sewers Ac-
counts. Chan-
cery will not in-
termeddle with

Difference be-
tween Commis-
sioners of Sew-
ers and Com-
missioners of
Bankrupt.

A Bill exhibited to have an account here of Money collected by Authority of Commissioners of Sewers dis-
missed by the Lord Keeper; for the Commissioners are to take the Account, and not the Chancery. Otherwise in case of Receivers by Authority in case of Commissioners of Bankrupt; for there it is concerning private Persons, but this of the Publick, and it was in vain to take Accounts in that Case in question, which the Court cannot determine. And altho objected, that a discovery is proper here, yet the Bill was dismissed on Demurrer.

King

King against Brownlow. July 21.

A Bill was exhibited in Chancery concerning Tithes and Bounds of a Parish, which proceeded to Answer and Replication. Then he exhibited another Bill in the Exchequer, and there Witnesses were examined and now proceeds again in Chancery, and replies. The Defendant pleaded the Proceedings and Examination in the Exchequer, and ruled good as to examination of the same Matters, which being examined to there, were not to be examined in Chancery.

Witnesses formerly examined in another Court, not to be examined here. Suit for Tithes.

*Ans. 25. 71. post
236. 239. Kelway.
96. a. b. 100. a.
Hard. 180.*

D E

Term. Sanct. Mich.

Anno Regis 26 Car. II.

I N

CANCELLARIA.

Norcliff and his Wife against Worlesley.

An Intail in Equity (not in Law) whether the Issue shall be bound by the Agreement of his Father without Fine.

THERE was Thomas Worlesley, Besail, Thomas le Ayle, Thomas le Pere and Thomas le Fitz. Thomas Great Grand father in consideration of 800 l. and Marriage of the Grand-father with Wood, covenants to make a Settlement of the Manor of, &c. to Thomas le Ayle and Wood, whom he was to marry, for Joynture for the Wife and the Heirs Males of Thomas by his said Wife. Thomas, the Grand-father, within one year dyed, Thomas, the Father, then in ventre sa mere.

5 Car. 1. Elizabeth, the Wife of Thomas deceased, obtains a Decree against the Besail for the Lands, for performance of the Articles both for her self and Son, Father of the now Defendant. Thomas, the Father, 1652. obtains a Decree to the effect of the former: It set out, that Thomas Besail after the Articles, and first Bill and second Bill, made voluntary Conveyances of the Lands, whereby he had settled them so as the Estate in Law was now in Elizabeth and the Son of John his second Son, under power of Revocation by Deed, and dyed after. Thomas, the Father, on Marriage with Penelope his second Wife (he then

then having Issue the Defendant Thomas by his first Wife, and inheritable to the (special Intail,) agreed (as tis alleged) to settle the Land on his second Wife and their Heirs by her; and pending the Suit Elizabeth conveyed away the Lands to Thomas the Defendant. Thomas the Father being dead, Penelope his Widow and her second Husband exhibits a Bill to have the Lands settled on her for her Life, viz. 300 l. per annum part thereof, and to have other part thereof payable to Debts; for Thomas, the Father of the Defendant, had so ordained by his Will in Writing. After Publication in this Cause, Thomas the Son exhibits his Bill against Norcliff and his Wife, grounded on an Agreement by Penelope with Thomas to accept of certain Lands, part of the Lands in Question of 100 l. per annum, in lieu of Joynture, Dowry, and all Demands, which was executed seven years by enjoyment by Penelope.

Two Questions arose. 1. Whether the Agreement of Thomas, the Father, to settle the Lands, &c. on his second Wife, did bind Thomas, the Son, by reason that he was entituled in Equity to an Estate Tail in the Land, and therefore should not be bound by his Fathers Agreement? For if the Land had been settled in Tail, it could not bind the Issue, and the Right of an Estate Tail is descended on him; And the Plaintiff sued for her Joynture raised on Equity, but it is a puny Equity to Thomas the Grand child. The Considerations are on both sides the same, viz. Marriage Agreement and Portion; only the Defendant Thomas insisted, that his Agreement by which he claims was in general Terms for Lands of 300 l. per annum, and not for Lands in Question particularly. And also if it were for some of the Lands by particular Names with Covenant that those particulars were 300 l. per annum, if such Agreement did bind as to the particulars, yet the Covenant for the value, nor the Will did not bind the other Lands so as to have the value supplied out of the other Lands agreed to be entailed. And though if the Lands had been entailed, though the Father might have cut off the Intail by Fine and Recovery, yet without Fine or Recovery they could not; And there is no Fine, &c. nor any Attempt or Proceedings towards levying a Fine or Recovery.

As to this Point the Lord Keeper Finch gave no resolution; but said, he conceived a difference in the Case, viz. Whether Penelope's Agreement was in general for Lands of 300 l. per annum, or particular; and if particularly relating to the Lands in Question; Whether so much was mentioned as amounted to 300 l. per annum, or, which in effect is the same? Whether it were not for 300 l. per annum Lands, part of the Lands formerly agreed by the Great Grand-father to be intailed, or in general for 300 l. per annum Lands, without relation to the Lands ut supra, by the Great Grand-father to be intailed. And therefore there was much dispute as to the Fact in that Point.

Where Equity
creates the Estate
it shall be guided
by Conscience.

2 *Rel. Rep.* 436.
2 *Fent.* 350. *Hard.*
96. 1 *Levin.* 219.
Tab. 203. 1. *Rel.*
Mor. 179. pl. 7.
off 294. *ant.* 172.

But the Lord Keeper though he was not positive in the main Point, yet said that as to the Agreement by the Father, whether to be avoided by the Son, now Defendant, that in case the Lands had been intailed de facto, and agreed, no Agreement could bind the Issue without Fine or Recovery or other legal Barr; yet he said the Agreement to entail was not an Intail; and though it raised an Equity against him that made it, yet that Equity is a Creature of this Court to be governed as Conscience directs by this Court: And said the Statute de donis was an ambitious Act in favour of the Lords against the King; and for that bouched the Lord Ellesmere. But before he had said this there were some Proposals of Agreement: And at length the Case was composed.

Depositions read
in both Causes.
Rel. 96. a b. 100.
a *Hard.* 180. *ant.*
25. 73. 233. 229.

There was a second Point which was fully proved, that must have ended the Cause (viz.) the Agreement by Penelope, ut supra. But a Dispute arose about the Proof, Whether the Witness that proved the Agreement could be read? For the Agreement was not set forth in the Answer to Penelope's Bill, but was proved in that Cause; and it was set forth in the Bill against Penelope and her Husband, but no Proof thereof in that Cause; so it was proved in one, and set forth in another Cause. To salve which defect, the Defendant Thomas moved, and had an Order, that the Depositions in either Cause might be used in both, which Order was after Publication in the first Cause, wherein the Proof was made; but before Publication in the second Cause; so as the Defendant in that Cause had the advantage, having the Liberty to see what was produced against them, and had liberty to examine.

Et

Mr John Churchil who was of Council for the Defendant Thomas, yielded that they could not be read by his Client. But for my part I know no prejudice to the Defendant, being warned by the Order, and might examine in the second Cause. But the Proposals of compounding the Cause took off all Debates.

Nora, The Defendant Worsley had a subsequent Order, saving all Exceptions, &c.

Prat against Taylor.

THE Bill was to have an account of several Sums of Money, which the Defendant a Fellow of Exeter Colledge in Oxford, Tutor to the Plaintiffs Son, received towards the necessary Decensions of her Son.

The Chancellor of Oxford by Instrument in Writing set forth the Priviledge of the University Charters, and Confirmation, &c. by Act of Parliament: And the Defendant was a Scholar, and Resident, and that they had a Court of Equity, and prayed that Taylor might be dismissed.

The Lord Keeper did not allow the Claim, and said, that Cognizance of Pleas in Equity could not be granted, though Presidents were shewn of the same Claim allowed in time of Queen Elizabeth. He asked if any could be shewn in the Lord Ellesmere or Conventries time; but none could be shewn. And thereupon disallowed the Claim, saying it must be put in by way of Plea. But withal declared it should not be on Oath, but it should be sufficient to aver the Defendant a Scholar, Resident, &c. without Oath; and so he said it should be in case of Outlawry pleaded, the Defendant should not be put to aver the Plea on Oath, but without Oath.

A Scholar of the University sued, the Chancellor puts in his claim of Priviledge by Writing, disallowed.

Bluet a Dane against Bampffield and others, Merchants of Denmark.

The reliefed against Actions of Trespass, for selling their Goods in the Island of, &c. on the pretence of breaking an Inhibition of the King of Denmark, where as by Articles of Alliance, between the Crown of England and mark.

Bill dismiss by Sentence given against the Plaintiff in the Court at Denmark.

and Denmark, free Trade was allowed to all English in all Ports of the Kingdom of Denmark, whereof the Island was a Port. But in regard Sentence was given in the Court there for the Plaintiff on the Seizure, the Bill was dismissed.

Anonymus. November 5.

Contempt discharged by a general Pardon.

Process issued till Proclamation was returned. Then came the General Pardon.

The Defendant appeared and demurred.

The Plaintiff moved to set aside the Demurrer; for the contempt was pardoned, yet the delay was no less to the Plaintiff.

The Lord Keeper. As to the Contempt, the Defendant stands rectus in Curia, and consequently all Contempts are likewise pardoned. Therefore proceed on Demurrer.

Anonymus. November 5.

A Rule, that if a second Answer be insufficient, Process shall go on where it was before.

THE Lord Keeper declared for a Rule, That if after Process of Contempt the Defendant put in an insufficient Answer, and so reported, the Plaintiff should not as formerly begin with Process at the Subpoena, but should go on to the Attachment with Proclamation and other Process, as if the Answer had not been put in.

Cox against Quantock. November 19.

A Devise to two Executors of residuum bonorum, one of them dies, the Administrator sues the surviving Executor for an Account. A Devise to two Legatees equal, if it survives.

THE Testator had two Executors, and devised to them residuum bonorum; &c. after the Debts and Legacies paid; one of them died, his Administrator sued the surviving Executor to have Mofety of the Surplusage. The Cause came to a Hearing. The Defendant insisted that the Executors were joint Devisees, and took the residue as Legatees, not as joint Executors.

The Lord Keeper decreed for the Plaintiff, for in case of Executors the Testator intended an equal share to his Executors; and by chief Justice Rolls Advice it was decreed, That where a Devise was to two equally, notwithstanding

standing which word Equally, the Devisees were joint; yet the intention prevents the Survivorship. *Chanc. Cases 64.*

The Cause was disputed; but to the dissatisfaction of the Bar decreed. For where the intention is secret and not declared, the secret intent must give way to the legal intent. And if an Administrator, then an Administrator de bonis non must have it. 19 November 1674.

Chalfont *against* Okes. November 21.

A Termor Grants the Estate in Trust for himself for life, and after for his Wife for life, and after to their Child or Children for their lives, and after to J. S. and whether the Trust to J. S. were good, the Lord Keeper took time to advise, and now delivered his Opinion that it was good. But if it had been to the Heirs of their Bodies, it had not been a good Trust after such Limitation to any other. He said, that in this and the like Cases the Chancery altered the Law; for at Common Law till Weldon's Case in Plowden's Commentaries Judgment was given against the Limitation, by Devise for a Term to one for life, the Remainder to another, and so over. But the Chancery decreed these Limitations good. But if it be in such manner as to make a Perpetuity, that may neither be in Law nor Chancery.

Contingent Remainder of a Term.

Negus *against* Fettiplace. November 21.

Fettiplace, Tenant for life of a Rectory in the Right of his Wife, demiseth the same to the Plaintiff for twenty one years, at 100 l. Rent, payable at Lady-day and Michaelmas; a fortnight before Michaelmas the Wife died; The Tenant sent to Fettiplace notice thereof; Fettiplace and the Plaintiff came to an Agreement; on which Negus gave Bond to Fettiplace to pay 800 l. (Michaelmas Rent) to Fettiplace, and Fettiplace agreed to save him harmless against all others for that Rent, and now sues to be relieved against the Bond, because no Rent was due, and no consideration for the Bond; and had a Decree against the Bond, though Mr. Attorney objected, and prest it, that there was no Fraud, and the whole truth was known, and it was in foro Conscientie. And the Tenant having

Bond to pay an agreement, and agreement to indemnify him relieved against the Bond without payment.

Ant. 85. 86.

Hard. 200. 204.

having taken all the Summer Profits, should pay for them, at least in proportion.

Cary against Appleton. November 26.

1. **T**he Husband devised the Jewels which were Paraphernalia of his Wife, and died. Decreed to the Wife.

2. The Husband devised his Goods to be sold for raising of Portions to be paid to his Daughters at their Ages of eighteen or Marriage, and that the same be raised out of his Rents, Issues and Profits of his Lease Lands, if the Goods were not sufficient, and the rest after Sale and Profits of the Goods and Leases, as aforesaid, to other uses. One Sister was paid, the other comes of Age, the Goods were not sufficient. The dispute was, Whether the Leases might be sold? For upon these Cases they are not to be sold, the Rents and Profits are liable.

Raise out of Profits implies a Sale.

Bertue and Stile
28 Jan. 27 Car.
2. in Cancell.

The Lord Keeper. In the Lord Cornbury's Case it was decreed, That the devise of Profits gave power to sell; otherwise if it be of the Annual Profits. A devise of the Profits is a devise of the Land; and the Father did as much intend a Provision for his Daughters as for his Son. And I take the difference where the devise is of the Profits of a Chattel Lease, and where of Lands, as in this Case. For if he had not directed a Sale, the Leases had been liable to the Portions, and so the affirmative words shall not bear a negative sense to exclude the sale of the Lease Lands.

Bokenham against Bokenham. December 4.

Conveyance by Tenant in Tail supplied.

Edmond Bokenham, the Plaintiffs Great Grand-father, made a Settlement of divers Lands and Mannors, inter al. Stockmarsh, which Estates descended to Sir Henry his Son, in Tail. Sir Henry in consideration of a Marriage to be had between Wiseman his Son and Grace Davies, makes a Deed of Feoffment, to the use of himself for life, the Remainder to Wiseman for life, the Remainder to the first, second, and other Sons by Grace. This Deed is indorsed generally (Livery made to J. S. appointed

pointed by Paul Dawes the Feoffee thereto,) The Marriage takes effect, Wiseman and Grace have Issue Henry Walsingham, Paul the Plaintiff, and Hugh the Defendant, and six other Sons. Sir Henry after levies a Fine to Walsingham then his eldest Son; and this was to the use of Sir Henry and his Heirs. Walsingham dies, and he conveys the Manor and Seignior to the Defendant, the fourth Son of Stockmash only, and dies. The Defendant enters, supposing that Liberty was not well given, because the Letter of Attorney to take Liberty was lost, as he supposed.

Lord Keeper decreed, 1. That the Letter of Attorney should be supplied, and Liberty admitted; though it was objected, that this was in effect to decree a Discontinuance, which is a Wrong and an unlawful Act, and that it was,

2d. To assist a Remainder Man in Tail in a third Remainder (for he was the third Son) against a legal Fine of his Father, Tenant in Tail, and whose Fine was a Bar to him in Law. And also against the acceptance of the Fine by Walsingham, who joined with Sir Henry, who had power by the Recovery to have barred the Estate of the Plaintiff.

But to this last the Lord Keeper said, The Grandfather might have the Conveyance made by himself in his own Hand; and its apparently so, for he recites in that Deed that he was Tenant in Tail, and he recites not the Feoffment made by himself.

Crofts against Wortley December 9.

A former Bill depending was pleaded in bar of a second: But though both Bills were of the same matter and effect, the later had some new matter.

Ordered, That being the Plea was good, the Plaintiff should pay the usual Costs of a Plea allowed. But the Defendant to answer the second Bill, and the former Bill dismiss with 20 s. Costs.

Anonymus.

There was a Decree for 5000 l. on Account against the Father in Execution, whereof the Process was carried to a Sequestration of the Lands, which the Father had at the time of the Decree, and settled on debate on the

1. Sequestration against the Heir.

2. Purchasers with power to revoke.

3. Not against a Voluntary Conveyance.

Best of the Father, though he also made Title thereto by Conveyance made to the Father.

The Question grew, Whether the Conveyance was revokable, or not? For if it were revokable the Lord Keeper would keep on the Sequestration, though the Decree was not for Lands, but for Personal Duty. And on producing several Conveyances, the Case was, That before the Suit, about 1663. the Father settled the Lands voluntarily on himself for life, the Remainder to his Son, with Remainder over; Provided he might by Deed revoke those Uses; but it was now farther insisted, (viz.) there was not express Power to limit other or new Uses, but only to revoke. Afterwards, and before the Decree or Bill, the Father revokes the former Uses, and by the same Deed limits an Estate to his Son; In which second Deed there is no power of Revocation; but though it was voluntary and for natural Affection, was absolute.

Limitation of
new Uses good,
the express
power being
only to revoke.

The Question was, If the Limitation of new Uses was good, the express Power in the first Deed being only to revoke.

The Lord Keeper declared his Opinion clearly that it was, and therefore discharged the Sequestration.

Lord Nottingham
Post 2. 46.

D E

Term Sanct Mich.

Anno Regis 26 & 27 Car. II.

I N

CANCELLARIA.

*Sir James Bellingham Nephew of Sir Henry Son
of Allen Bellingham against Elizabeth Low-
ther, Agnes, Sir John Wentworth.
14 January 1674.*

9 Jac. **S**IR James the Grandfather of the Plaintiff settled certain Freehold Lands in Westmorland to the use of himself for life, the Remainder to Henry his Son, and the Heirs Males of his Body, the Remainder to Allen his second Son, and the Heirs Males of his Body, the Remainder to his own Heirs; and covenanted to settle Copyhold Lands in the same manner, and died 10 Jac. The Freehold was settled, but non constat the Copyhold were, but Sir Henry surrendered to the use of him and his sequel.

1649. Sir Henry having suffered a Recovery of the Freehold, Covenants with Willoughby, &c. to settle the Freehold Lands on himself for life, the Remainder of part to Katherine his Wife for part of her Jointure, the Remainder to the Heirs Males of himself by Katherine; the Remainder to the Heirs Males of his Body, the Remainder to Allen, and the Heirs Males of the Body of Allen, the Remainder to the Heirs of Sir Henry, and covenanted with the same Persons to settle the Copy-

It is

hold

hold by Surrender to himself for life, the Remainder to Katharine in full of her Jointure, the Remainder to the Heirs Males of Sir Henry by Katherine, the Remainder to the Heirs Males of Sir Henry, the Remainder to Allen and the Heirs Males of his Body.

Sir Henry Bellingham coming to make a Surrender of the Coppbold, fell sick by the way, but made a Letter of Attorney to others to do it, but died before it was done. The freehold Lands remained to Sir James the Son, and Petr Male of Allen who now exhibited his Bill against Thomas Lowther and John Wentworth, to whom the Coppbold Lands descended as Heirs general for want of Surrender. The scope of this Bill was to have Assurances of the Coppbold, and to be relieved against Actions at Law.

There were severall matters in the Bill, but this was the effect and substance of the Case upon the Plea. And it was said that this Covenant was but voluntary as to Allen, because he was no party to the Covenant, nor within the consideration of the Marriage, or Portion. And in case of Sale for Money if any Sale had been made it might be fraudulent as to Allen, and yet be good as to Katharine, and the Issues of the Marriage, as it was in Sir John Jacobs Case. And if one make a voluntary Conveyance, to a younger Son, the same shall not be made good in Equity against the Heir at Law, if it be a voluntary Conveyance, and defective in Law; and if it had been executed by Surrender in the principal Case, yet Sir Henry might have cut it off by the Recovery.

The Answer to these Objections endeavoured and offered was. 1st. That Sir Henry here expressly intended to preserve the Name and Male of his Family before his Daughters, though they should happen to be his Heirs; for he limits the Estate to his own Heirs Males, and immediately after to Allen, and his Heirs Males, which was likewise done by Sir James his Father, and that was consideration enough, (viz.) not only his Name, but his Blood as his Brother was; and the continuance of his Name in his Blood was not only a good consideration, but such as prevailed with old Sir James and Sir Henry above the affection of the Heirs general: And the consideration of the Deeds of Covenant is not only the Marriage of Katharine, but continuing the Lands in his Name and Blood. And the Covenant binds Henry and his Heirs; and though the Covenant be with others, and not with Allen, yet the Covenant is obliging to the Heir, and puts a tie

Deed fraudulent
as to one, and
good as to an-
other.

a tie and obligation on Sir Henry and his Heirs, and so differs from a voluntary Conveyance without Execution; for there is no tie in that Case, no Man at all is bound by it: It is merely void, and so is not this Covenant. And though it be true, that if the Surrender had been made, and thereby Henry Tenant in Tail, with Remainder to Allen, yet he might by Recovery have barred the Remainder; yet unless he had made some attempt that way, his intent and covenant stands still good, and differs from Worley's Case fol. for there was an act and endeavour to cut it off, but no such here.

Difference between a Covenant to settle Lands, and a voluntary Conveyance.

Lord Keeper. Can the Plaintiffs amend your Case on proof?

Churchil, They cannot; for we admit the whole Bill.

Lord Keeper. If Sir Henry had had a Son by a former Wife, you could have no relief against him on this Covenant, which as to the Plaintiff is merely voluntary, and matter of kindness. And if Sir Henry and Allen were both in life, Allen could not enforce Sir Henry to execute the Covenant; yet Katharine might; for it were vain to decree that to be done by Henry, which Henry might undo the next day; and so it was resolved in Hockleys Case, the younger Brother goes away with 1500 l. per annum, and the Wife general has but 200 l. per annum, Coppbold. And for the reasons given dismiss the Bill 14 Jan. 1674.

Holloway against Collins, February 6.

A Legacy of 125 l. was given to the Plaintiff being but ten years old, and at that age was paid to the Plaintiff's Father, who after died insolvent, the Infant at full age sued the Executor of the Debtor for the 125 l.

A Childs Legacy paid to the Father, who failed, the payment decreed.

The Lord Keeper held it good payment: But was pressed very much by the Attorney General of the ill consequence; for the Law must be the same if it were 1000 l. and extends to other Cases of like nature, not to Legacies only.

Lord Keeper, What should the Executors do?

Attorney General. Have taken security to repay it to the Infant, or sued here to have it paid.

Lord Keeper. It may be so where a Legacy will bear the charge of Suit, but not else, and delivered his Opinion accordingly. But the Defendant being put to prove the payment

payment, did prove likewise that the Executor took a Bond, which the Court press the Defendant to shew. Whereupon the Solicitor in the Cause said he had it not, but would produce it by the next day. But said it was a Bond to the Executor to save him harmless.

Lord Keeper. Then he paid on the security at his own peril.

Churchil desired time to shew the Bond till the next day, for we may not trust the Judgment of the Solicitor what the same is. It may be it is to pay to the Infant at his age.

Lord Keeper. I shall believe the worst, unless you shew the Bond, therefore decreed the Executor to pay it.

Hole against Harrison. February 17. Et e contra.

Three bound in a Recognizance, one is sued and paid the whole, another is insolvent, the third is sued for contribution, he shall contribute a moiety and not a third part.

HOle, Harrison and S. were bound in a Recognizance to the Chamberlain of London. The Plaintiff Harrison was sued thereon, and paid the whole Bond, and now sued Hole, who was bound with him for Contribution. Hole, Harrison and S. being all bound, and J. H. was dead insolvent, and S. was run away. The question was in what proportion the Contribution should be (viz.) of a third or moiety? Decreed a moiety, for S. is insolvent.

Sir Holland and his Wife against Blandy. February. 17.

The Wife endowable of two Mannors in Surry and Stratton in the County of Wilts, which consisted of Copyholds, is endowed by Indenture of the Helts of the Mannors in the County of Surry, and by parol Agreement was to have a third part of the Rents and Profits of Stratton, and the Rents were accordingly paid to her in proportion for thirty years and more. The Copyholders purchase the Inheritance of their respective Copyholds in 1647. and shall pay their Rents in proportion, during the ancient lives of the Copyholders they purchased for Bond, the lives being dead on which the Copyholds depended, the Plaintiff sued for the third part of the improved value. The Defendants pretend that they had no notice of the Agree-

Agreement, and being Purchasers without notice were not to be obliged thereby.

The Plaintiffs insist that they had notice, and so the payment of the proportion of the Rents proved, and it was publickly notified at the Courts of the Manor, and divers of the Tenants had abatement in their Purchase, though the Defendants denied they had any.

At the Rolls the Plaintiff had a Decree for the Rents and Improvements.

The Lord Keeper on Appeal reversed the Decree as to the improved values, and confirmed it as to the Rents, and left the Plaintiffs to take their course for their Fines, for which there was an Agreement; but as he said there was none for the third part of the improved values. And it was then prest the Defendant must have paid fines, if they had not purchased the Fee, and by their Purchase the Plaintiff, who but for this Agreement could have had Dower of the Lands, the Copyhold being determined, and the Act of the Copyholders shall not keep the Plaintiff from Dower and hinder her from fines. And therefore it was prayed that some course might be taken in that.

The Widow of the Lord decreed to be endowed of the third part of the improved values of the Copyhold, but reversed by the Lord Keeper as to that. Act of the Copyholder not to hinder the Lords Wife of Dower.

The Lord Keeper. I leave you to your Courts.

Jacob against Thatcher. February 17.

The Plaintiff had a Joynture made by her husband of Lands subject to a Judgment, which Thatcher purchased in, and did extend the Judgment, and took a Lease from the husband, who died.

Purchaser without notice not protected.

Decreed that Thatcher shall not hold over by the Lease, since the Profits taken after the Extent were enough to satisfy the Judgment according to the true value, nor shall hold over by the Extent after the extended value to protect his Lease, although in truth he did purchase the Lease for valuable consideration, tho also he had taken a Lease first and for valuable consideration and without notice of the Joynture, and then had bought in and extended the Judgment, he might protect his Lease thereof. But Sir John Jacob and he (viz.) Thatcher, when the Extent is sold in, and in a way of satisfaction by the true value, shall not turn the Debt on the Joyntress. The Extent it seems was returned and filed, but Thatcher, entered not by a Lease subsequent.

Hixon

Hixon against Wytham.

Clement Wytham seized in fee, made a Writing in this form, This Indenture made the day of, &c. between Clement Wytham of, &c. of the one part, and James Orbel of, &c. William Skinner of, &c. of the other part: Whereas there are divers Debts owing to Clement Wytham, and having an intention not only to raise Portions for his younger Children, but also to raise Money for the payment of his Debts, although his personal Estate came not in: Now the said Clement Wytham in consideration of 5 l. doth grant, bargain and sell to the said James Orbel and William Skinner all those Lands, &c. mentioning the Lands, but not Estate, on Trust to sell after his decease, the Money raised by Sale to be employed as follows, and named divers persons to receive several Sums, and the rest of my said Money, and my Plate, and other my personal Estate of me the said Clement, (and here in this part changeth the person, and speaks in the first and not in the third person) I give and bequeath in manner following, and appoints to several persons several Sums, and then addeth, I hereby name the said James Orbel and William Skinner my Executors to the Uses aforesaid.

1st. It was questioned, whether this was a Will or not, being made in the form of an Indenture, and as above: But the Defendants deserted that Point, and yielded that it was a Will, and the Lord Keeper accordingly.

Lands devised
for payment of
Legacies, made
subject to Debts.

2d. The Plaintiffs are Creditors of Clement the Testator, and sued to be satisfied out of the Trust, they not being named, and on his Sale, if the particular Legatees be paid, little or nothing will be kept; and there is no Clause in the Will that his Debts should be paid: But on the other side the Words having an intention not only to provide Portions, &c. but also to pay his Debts, &c. and making his Executors to the Use aforesaid, refer to the whole.

The Lord Keeper pronounced this Decree, That the Plaintiffs the Creditors should be paid before the Legatees, and not only in proportion, but before them; for a Man may not give but what is his own; but what he hath ultra se alienum. Therefore the Legatees shall come into the Trust after the Debts. But a Debt without Specialty, is as much

much as a Debt Jure naturali, and in Conscience as a Debt by Specialty, and therefore there shall be an Equality with Debts by Specialty where Conscience is the Judge. But the Lord Keeper being urged, that the Presidents of the Court had been otherwise (viz.) that when Lands are to be sold for payment of Debts and Legacies by Trustees, the Legacies were in equal degree with Debts, unless it were such Debts as charged the Lands; and the reason is, because only the Will of the Owner makes the Land payable, and gives no preferment to the one before the other. Thereupon the Lord Keeper gave time to present Presidents to him.

Debts on simple Contract to be paid in proportion with Debts by Specialty where Lands are devised, &c. Whether Debts and Legacies are to be paid equally, where Lands are devised for payment of both.

Leech against Leech. February 27.

THE Bill was by Trustees to guide and direct them in others Trusts, and to protect them in executing the same, which the Court now did (viz.) the Father made a Lease in Trust with reference to his Will, and thereby devised to several of his Daughters 500 l. to each, to be paid at one and twenty years of Marriage, and if any of all dyed before, then to others. The Daughters had no other Portion, nor no Maintenance, and direction was prayed by the Trustees, whether they might allow the Daughters Maintenance.

Where there is a Devise over of the Portion the Court can allow no Maintenance out of it; otherwise, if no Devise over.

The Lord Keeper. No: Because of the Devise over; else it might have been done.

2. The Father Tenant pur autre vie made a Lease for 99 years, as was pretended, but was to A. and B. and their Heirs habendum for 99 years, which Mr. Attorney pressed was void, and then the Trust annexed to the Lease is void.

If a Trust be for payment of Debts, it may support a Conveyance, otherwise void.

The Lord Keeper. The Trust is for payment of Debts and that shall support the Trust.

3. A Trust for payment of Debts generally is good against an Heir, though no Creditor be Party to the Deed, nor Debt expressed in particular, nor Covenant in the Lease to pay.

Trust for payment of Debts generally good against an Heir though no Creditor party. But not so against a Purchaser.

But the Lord Keeper said, he would not maintain it against a Purchaser.

Whorewood *against* Whorewood. Febr. 22.

Rept. Chan.
1 Part. 229.

A Decree for Alimony *quousque* Cohabitation. The Husband exhibits a Bill, and offers to cohabit.

Note, This in a time of the Commissioners who had this Jurisdiction especially given.

In the late times of the great Troubles, the Commissioners of the Great Seal, as they were then called, had Jurisdiction given them in the Case of Alimony between M^r. Whorewood and his Wife. A Decree was made that M^r. Whorewood should pay 300 l. per annum to his Wife till they cohabited, and during their separation, and assurances to be made for payment thereof, with Condition to be void in Case of Reconciliation and Cohabitation; but the assurances were made without these Conditions. M^r. Whorewood for six years paid not the 300 l. per annum, The Decree was confirmed by the general touching Judicial Proceedings. M^r. Whorewood did not rest there, but exhibited a Bill of Review, and thereon the Decree affirmed, for the Bill was dismissed. Further struggling was by M^r. Whorewood, and References, and now he exhibits this Bill that the 300 l. per annum might cease, because he offered to be reconciled, and desired to cohabit with her, and use her as his Wife.

The Lord Keeper was assisted now by Chief Justice North and Justice Rainsford.

On the Defendants part it was said, that the Act being made when there was a Suspension of Ecclesiastical Jurisdictions, the same was conferred to the Commissioners who were to act according to the Laws Ecclesiastick, and so ought this Court now to do; and it cannot be conceded when there is a Separation and allowance of Alimony quousque, &c. that a single declaration of the Husband without consent of the Wife should free him from Alimony, for then he might so declare and avoid the Sentence the next day: But it must be by her Consent, or on clear proof that it is meer wilfulness in her, and that the fear she had was justly removed, which in this Case appears by her Oath not to be. And she had great cause to be in fear by sixteen years struggling against the Sentence, and his Cruelty by her Prosecution of him, and the Dismissal of his Bill of Review had now foreclosed him to sue for Relief by way of Original Bill: And the Decree is for 300 l. per annum till Cohabitation by Consent, which Cohabitation must be by mutual Consent.

Resolved

Resolved 1st. That though the Assurances were absolute without the Conditions or Limitations quousque, &c. yet the Deeds being in performance of the Decree (for so it was expressed in the Deeds) yet they should be ruled and guided by the Decree. Absolute Conveyances guided by Decree that directed them.

2. That an Original Bill was proper in this Case, notwithstanding the Bill of Review dismissed (viz.) the Court is invested with the same Jurisdiction which the Ecclesiastical Court had, and when a Decree is temporary and for special ends, an Original Bill lyeth to put a period to it, and to shew the purposes of the Decree satisfied. Where a Decree is temporary or for special ends an original Bill lies to put a period to it.

3. That the Court could not discharge the Arrears.

Justice Rainsford was of Opinion, That neither the willfulness of the Wife, nor pretences of kindness, or desires of Cohabitation should prevail either way, and therefore that a Cryal should be made, and she to be ordered to cohabit for half a year or the like, to see what would be; and the Decree of Alimony to be suspended, and after ordered or suspended, as there should be occasion. The Decree to pay till cohabit, and now the Husband offers to cohabit, the Court cannot in this Case discharge Arrears.

North. The Decree hath no force but from the Consent of the Parties, else the Ecclesiastical Court could not decree Alimony, as this Case is; for if they had decreed a Separation then they might also decree Alimony, but not Alimony alone saving pro expensis litis. But here is no Sentence of Separation, and therefore the Husband in this Case may sue his Wife ad obsequia debita in the Ecclesiastical Court, or sue those that detained his Wife at the common Law notwithstanding the Decree here. No Alimony can be decreed, but by Consent, unless first a Decree for Separation.

The Lord Keeper. I cannot decree a Separation. I shall not continue the Alimony to the Wife, if she will not cohabit, nor decree the Wife to cohabit; but shall not discharge the Alimony or Sentence, but keep it in suspense. But the Wife shall return to her Husband, who shall maintain and use her as a Gentleman and a good Husband ought to do, wherein if he fails, I will hear the Wifes Complaint with favour, and lay on the Decree again, as Cause shall be; but now suspend it, saving to her the Arrears. But she shall immediately return, and if not, she shall have no benefit of the Alimony till she do so, but take her remedy in the Court Ecclesiastical.

Erswick against Bond. February 22.

A Covenant to secure the Purchaser by other Lands not decreed.

ERswick and his Wife seized in the Right of his Wife, conveyed the Lands to the use of himself for life, with power to make Leases, and sold the Lands; and to secure the Purchaser against such Leases, as might have been made, took a Covenant against the Vendor that within two years he would convey other Lands to that intent; the two years being past and no collateral assurance made, next Term after the two years expired the Purchaser exhibits his Bill to have collateral Security according to the Covenant.

Diversity between Covenants for further assurance and collateral Security.

The Lord Keeper dismiss the Bill, and takes a difference between Covenants for further Assurance of the Lands sold, and collateral Security of other Lands to incumber the Estate; and the two years being elapsed dismiss the Bill; Ex relatione Sir John Churchill of the Plaintiffs side.

Williams against Williams. February 23.

A new Bill after Dismission on Hearing on Suggestion of notice which was not in Issue in the former Cause.

A former Bill was exhibited, thereby to set up an Agreement to charge the Defendants Lands. To which the Defendant set forth that he was a Purchaser for valuable consideration; and Issue being joyned thereon, the Defendant proved his Case, and the Bill was dismissed; and now a new Bill on the same Equity was exhibited; but now charges the Defendant that at the time of his Purchase he had notice of the Plaintiffs Equity (viz.) an Agreement, &c. It not being charged in the former Bill, and that the Defendant had notice, nor by the Defendant set forth that he had no notice, nor Examination to that point. The Proceedings in the former Cause were pleaded in Bar; for this Course will make Suits endless, and no Man will charge notice in the like Case, but try upon one Point first, (viz.) Purchaser or no: But the Plaintiff should before Hearing have exhibited the Bill he doth now, but now it is too late.

Notice not denied, yet in Issue and not proved after Hearing, may have Defendants Oath on a new Bill.

The Lord Keeper over-ruled the Plea, with this further Declaration, that the Defendants Answer should not conclude the Plaintiff; but though he denyed notice, yet the

the Plaintiff should examine thereto. He said also that in case Examination should be made of notice, and no proof of it, if the notice had been denied in the former Suit, yet the Plaintiffs Bill to have the Defendants Oath would lie, but then the Defendants Oath should not be conclusive.

Maynard against Moseley.

SIR Edward Mosely conveyed Lands to the Use of Thomas Leigh Esquire, &c. and their Heirs on Trust to raise 3000 l. for Mary (his only Daughter) and if he should have more than one Daughter, then 2000 l. a-piece. He had Ann a second Daughter and dyed: Ann dyed young and intestate, Sir Edward, Brother of Ann and Mary surviving Ann; afterwards Mary marrying unto Joseph Maynard, Edward the Brother gave 5000 l. with her, and 7000 l. more he agreed to pay on Contingencies: Joseph releaseth to Edward the Brother all Demands and Portions which he may claim in Right of his Wife, except the 5000 l. and 7000 l. and other particulars. Young Sir Edward dyes without Issue, and devises his Lands to Moseley the Defendant, and by such death of Sir Edward the 7000 l. grew due. Mary takes Administration of her Sister Ann and sues for the 2000 l. and also the 4000 l. There were other Circumstances of the Agreement by Sir John Maynard, Father of Joseph, which induced the Court to dismiss the Bill as to the 4000 l. for the Lease for fifteen years, whereout the 4000 l. secured was in Joseph Maynard in Right of his Wife; but as to the 2000 l. my Lord Chief Justice Hales and Vaughan agreed that it belong'd to Mary as Administratrix, and the Agreement did not discharge it, for if a Stranger had taken Administration he should not be barred, &c.

The Lord Keeper gave Reasons for his differing in Opinion from the Judges, but decreed the 2000 l. according to the Opinion of the Judges.

This was a Bill of Review brought by Joseph and Mary against a Decree made by the Lord Keeper Bridgman; and to which Bill of Review Moseley demurred, and his Demurrer overruled by the Lord Chancellor the Earl of Shaftesbury, who was assisted by Judges. The Cause was heard ab integro by the Lord Finch, assisted by the two Chief Justices, *ut supra*, and decreed *ut supra*.

Another

Another part of the Case was decreed against Joseph Maynard and his Wife, and was (viz.) Articles of Agreement were made between Sir Edw. Moseley and his Wife, Thomas Leigh, &c. Friends of Sir Edward Moseley, one for him, the other two Trustees for the Lady, by which on Sir Edwards part, and on his behalf some Lands in Lincolnshire were to be sold for payment of his Debts and Annuities to be paid the Lady for Maintenance of her Children, and 400 l. per annum to the Lady for her separate Maintenance and Joynture, of 5000 l. per annum out of several of the Lands for the Joynture of the Lady after Sir Edward Moseleys death, and the Lady being seized in Fee of the Lands of 300 l. per annum in Derbyshire. It was agreed that the same should be settled, and that after her death it should remain or descend to the said Sir Edward, and the Issue between him and his Lady begotten and to be begotten, the Remainder to the Lady and her Heirs in such sort as she shall not have power to alien from his and her Issue.

And after within the year an Indenture was made and sealed by Sir Edward and the Lady and his Trustees, whereby it was agreed, that Fines should be levied of all the Premises, and the Use for sole separate Maintenance, Annuities and Portions for Children and Joynture, appointed according to the said Articles; and for the Derbyshire Lands the Use was to be to Sir Edward for his life, Remainder to the Lady for her life, Remainder to Sir Edward the Son for life, with Remainders to the first, second, third, &c. and other Sons of Edward the Son, and the Heirs Males of their bodies, Remainder to the Daughters of Sir Edward, and his Lady in Tail.

Afterwards cross Suits arose in Chancery, the Ladies Trustees Plaintiffs on the Lady's behalf against Sir Edward, and Sir Edward Plaintiff against them, in which the Annuities and separate Maintenance are decreed, and that Fines should be levied according to the Articles and subsequent Deeds, and inrolled; but though the Lady had formerly joyned in Fines as well of the Manchester Lands out of which the separate Maintenance as to 100 l. part thereof was settled; as to the Lands to be sold for Debts no Fine was levied by the Lady of the Derbyshire Lands nor of the Staffordshire Joynture Lands by Sir Edw. but after the Decree the separate Maintenance and Annuities were paid while Sir Edward lived, saving about 200 l. of the Annuities which were arrears at his death. And whereas no particular

particular Lands were appointed by the first Articles for a Joynture, by the next Deed Manchester 100 l per annum, and the Staffordshire Lands were limited to the Lady for her Joynture.

Sir Edward being dead, the Lady entered into the Staffordshire Lands and Manchester Rents, and held them whilst she lived, and received the Arrears of the Annuities.

After her death Sir Edward Moseley, Son and Heir of Sir Edward and the Lady were sued by the Creditors of the Lady, to whom she had bound her and her Heirs in Bonds to discover Assets of his Mother's Estate, particularly the Derbyshire Lands.

So which by Answer he set forth the Agreements, Deeds and Decree, and that thereby he was a Purchaser in Equity for his life, with Remainder, &c. and not liable to the Debts of his Mother as her Heir; and the Creditors proceeded no further. After which Sir Edward the Son mortgaged those Derbyshire Lands, and after devised them inter alia to Edward Moseley the Defendant.

Joseph Maynard and his Wife were Plaintiffs for the Derbyshire Lands, Ann the Sister being dead without Issue; and prayed to have Recompence for the Alienation against Edward Moseley Devisee, the Executor of Sir Edward Moseley the younger, upon the Equity. But although the Lady was not bound by her Agreement made during Coverture, yet when after the death of her Husband she received the Arrears according to the Agreements and Decree, and enjoyed the Staffordshire Joynture according to the last Deed, she was now bound by what she did being a Widow, and Sir Edward survived having on his Oath claimed those Grounds as Purchaser, and not as Heir to his Mother, and thereby freed himself from the Debts of his Mother, he might not if he had been sued by his Sister have claimed other Estate, and consequently his Trustee could not, and therefore the Sister ought to have the power to and in the Deed, and satisfaction for what it should cost her to redeem, he having devised his Lands for satisfaction of his Debts, Legacies and Engagements. But the Bill of the Sister was dismissed by the Lord Chancellor Finch, Hales and Vaughan Chief Justices concurring. It was on Construction of the first Articles.

Heir at Law by Marriage Agreement became a Purchaser in Equity, and not liable to pay Debts of his Ancestor.

Feme though not bound by her Agreement during Coverture, yet acting according to the Agreement when a Widow, is bound by it.

Papilion *against* Hix.

On a Plea.

HIX a Tinner in Cornwall atticted with Papilion to sell and deliver to him sixteen Tun of Tyn free from all Customs and Duties, part of the price paid, the rest secured to be paid. Hix after the Tin was seized, for that the Coynage had not been paid, which by the Custom of the Stannaries is a Forfeiture in case that the Tyn be sold before Coynage paid or secured; and because the Forfeiture was by Hix, Papilion sued him to be relieved, he having covenanted to deliver it Custom free.

The Lord Chancellor dismiss the Bill. I will break this Trade between the Tinner and the Merchants; for by this Trade the King is cozened and the Coynage Duty seldom answered. The Tinner pays no Duty, selling to the Merchant in small Ingots; and if it chance to be taken, he affirms he did first pay the Coynage, and then puts it into small pieces easy to hide and transport: And if he be spied, pretends he coyned it, having first coyned two or three Slabs, and all the rest he transports and sells in little pieces by colour of Coyning one or two Slabs. I will break this Trade.

The Tinner articles to deliver Tin to the Merchant Custom free; after delivery it is seized for Custom, and the Merchant sues to be relieved, but is not, for it is in fraudem Regis.

The Lord Keeper Finch.

Chamberlain *against* Chamberlain and others.

THE Case was, That Thomas Chamberlain Esq; being possessed of Leases of 3000 l. yearly, and owing several great Debts, made his Will, and made his Wife Elizabeth his Executrix, who proved the Will, and paid the Debt as far as the Chattels Personal or Stock would reach, but no farther: And there being yet Debts unpaid above the value of the Leases, she assents to a Bequest of the said Leases made by the said John Chamberlain in his said Will, (viz.) to the said Elizabeth for her life, and after to John Chamberlain the eldest Son of the said John Chamberlain for his life, and after to the first Son of the said

said John Chamberlain the Son, and the Petrs Wives of the first Son, after which assent Elizabeth dies, and leaves Mr. Croft her Executor, who came to Article with the Plaintiff to sell the said Leases to the Plaintiff for 900 l. whereupon the Plaintiff exhibits his Bill against the Defendant John Chamberlain the Son, and Thomas Chamberlain the first Son of the said John Chamberlain the Son, and Mr. Croft the Executor. And now the question was, Whether Debts being unpaid at the time of the said assent, and nothing liable to make good the said Debts saving the said Leases, the Leases might be Assets in the Hands of Mr. Croft, so that he might sell them to answer the said Debts, notwithstanding the said assent; Or whether the said bequest of the Leases were vested in the Remainder, according to the said devise by the assent, and could not be divested by the sale of Croft the Executor.

And now the Lord Keeper declared and decreed Croft to convey according to his said Articles to the Plaintiff, and that the said Leases should be Assets notwithstanding the assent. And first he relied on this Rule of Court, That an Executor shall not be forced to pay Legatees until the Legatees shall give Bond to refund in proportion, or in the whole, for the satisfaction of Debts if any do appear unsatisfied. Yet the Legatee upon his Bill in the Court shall refund, and this as well as where it is Legative in specie, as a Poise, or a 1000 l. actually paid; for the Legacies are not due till the Debts be paid, and a Legacy being paid remains as a Legacy in the Hands of a Legatee after payment: And hence it is that a Legacy is not attachable by Foreign Attachment, being it may work a wrong to the Creditors, who are third Persons, and can have no day in Court in that Suit to interplead. And for this reason if an Infant Executor assent, it is no good assent if there be not other Assets for Debts, which the Common Law provides for the security of Creditors, much more shall this Court provide for their security: But if after such assent, John Chamberlain the Son had sold the Leases to a third Person bona fide, this had defeated the Creditors, for he had a good Title in Law, and the Purchaser should not be prejudiced by this trust for the Creditors. And in this Case it was also ruled, that if an Executor make a Devastavit, and die, his Executor is liable to make good of the quantum of the Devastavit to the Creditors, if he hath Assets from the first Executor.

Leases are Assets to pay Debts notwithstanding the assent of the Executor to the devise of them.

Legatees shall give Bond to refund in case of dormant debts arising.

The nature of a Legacy.

Legacy not attachable by Foreign Attachment.

Infant Executor Assents to a Legacy.

Trustee of a Term after the assent of the Executor sells it bona fide, if good against Creditors

Executor of an Executor liable to a Devastavit made by the first Executor.

Note, A Case was cited, wherein it appeared that the Spiritual Court insisted to have security to answer Debts before the Executor should pay the Legacy, and a Prohibition was prayed, but denied. And in this Case because it appeared that the Defendant Thomas Chamberlain was not born at the time of the decease of the said John Chamberlain the Grandfather, nothing could vest in the said Infant, and therefore the whole Terms remained in the said Defendant John Chamberlain; and for this reason the Bill against the Infant was dismissed.

Note, This Hillary Vacation, a little before Michaelmas Term, the Lord Keeper declared it should be the Rule, That a Mortgagee forfeit should have Interest for his Interest, and should be only accountable for what Profits he should receive, and not for what he might have received, unless there were fraud.

And note, That it was always the Rule, That the Mortgagee assigning, the Assignee should have Interest for the Interest then due, and never was contradicted but in Porter and Hobarts Case in the time of the Lords Shaftsbury.

Note, The Lord Keeper ruled that a Plea of Outlawry should be put in without Oath, because of the Overments of the identities of Persons; and ruled that a Plea of the Privilege of Oxford should be put in without Oath, between Masters and Bush, 24 October last.

Mortgagee forfeit shall have Interest for his Interest.

Mortgagee assigning, the Assignee shall have Interest for the Interest then due.

Plea of Outlawry put in without Oath, Identities.

DE
Termino Paschæ

Anno Regis 27 Car. II.

IN
CANCELLARIA.

Tanner *alias* Davis *against* Florence. April 19.

SIR Hugh Smith Grandfather to the Defendant and H. S. 21 Jac. made a Lease by Indenture to Arthur Tanner for ninety nine Years, if Arthur, Elizabeth, and Thomas their Son, or either of them should so long live. In which was a Covenant from him and his Heirs, That if Thomas died, leaving Arthur and Elizabeth to make a new Lease for Years, if he and Mary her Daughter should so long live, and renders the 20 L. and surrenders the old Lease, and dieth, the said Mary, Administratrix of Arthur Tanner, being married to Davies, they sue the Defendant for a new Lease, charging that they had notice of the Lease, 21 Jac. and Covenant.

The Defendant (viz.) Florence makes Title as Jointures by Conveyance made by the said Sir Hugh for valuable consideration, and of marriage to be had between Florence and William Son of Sir Hugh, of the Manor of Ashborn, whereof the Lands in question are parcel; in which there is a Covenant against Incumbrances, except Leases or Copies determinable on three lives, and on the said William and Florence, and the Heirs of William by Florence. And the Defendants deny notice of the Lease set forth by the Plaintiff, or of the Covenant, but believe there

there was no such Lease or Covenant, because they have a counterpart of a Lease of the same Land to the same Arthur Tanner for ninety nine Years, and determinable on the same lives under the same Rent. In which counterpart there is no such Covenant to renew, and other counterpart the Defendant never had.

The Land
bound by Cove-
nant.

This Case was heard by the Master of the Rolls, who decreed the Jointures, and the Defendant Sir Hugh, Pet to the Intail, to make the Lease. From which the Defendants appealed to the Lord Keeper, who heard the Cause this 19th day of April, and affirmed the Decree.

Exception of
Leases for three
lives: In one of
those there is a
Covenant to re-
new, paying
20 l. It is notice
implied, for they
ought to see the
Covenants.

For it was said, that it was a real Covenant that bound the Assignee at Common Law; which the Lord Keeper also affirmed. But was much denied by the Counsel of the Appellant, for the Case of a Covenant to repair is nothing like, for there it concerns the Land during the old Lease in being, this a new Lease.

Lord Keeper. The exception of Leases, ut supra, gave notice of former Leases, and therefore you must take notice of the Covenants in them.

It was answered thereto, that the Exception is a Generality, not particular of this Lease, and is but for three lives; but this in effect is for four lives. And it might as well be good for five or six lives, or of the Inheritance; and the course in Purchases is to take such general Covenants; As in this Case when a Manor is sold, it is not usual to peruse all Counterparts, and many times they are wanting, and then it will make it very difficult to sell a Manor in the West Country. And if the Appellants are Purchasers without notice, the former Leases may answer for that, &c. Lord Keeper decreed it.

D E

Term. Sanct. Trin.

Anno Regis 27 Car. II.

I N

CANCELLARIA.

Anonymus. July 11.

THE Plaintiff Executor for Children was to purchase Lands for them, and treated with the Defendant, who affirmed that the Lands were 250l. per annum value, and offered to take a Lease at that rate for fourteen Years; and did take it, and secured the Rent by Lands of livers worth 60l. per annum, but paid not the Rent for five Years. Whereupon a Re-entry was made according to a Condition in the Lease. And the Lands so entred into possessed for divers Years. The Vendor could have no Relief, against the collateral security, unless payment were of the Arrears of the 250l. per annum due before the Re-entry as well as after the Re-entry. The Lands sold being worth but 160l. per annum.

Vendor of Land takes a Lease of them at such a Rent, with condition of Re-entry, and gives collateral security for the payment of the Rent and a Re-entry. Vendor could have no relief against the collateral security without payment of the Arrears.

Dowdswel against Dowdswel. June 15.

THE Bill was to have certain Surrenders made, but not ingrossed, to be made up and ingrossed. The Plaintiff and Defendant were Brothers; and in this Case agreed by the Lord Keeper, that the Father being Lord of the Mannor could not declare the Trusts of Copyholds granted to his Son, tho he took the Profits always by their consent. Eadem die decreed between Holford &

Lord of a Mannor cannot declare a Trust of Copyholds granted to his Son.

Wright

Wright *against* Coxon. June 17.

Plea of Account
stated, over-ruled
though the
Defendant but
an Executor,
and the Account
stated by the
Testator.

AN Account stated, and a Ballance thereon made
whereby 3000*l.* was due to the Defendants Testator.
And the Plaintiff retited the Debt by the Account, and
covenanted to pay to the Testator, and now sued to be re-
lieved, supposing that 200*l.* to be mentioned in the Ac-
count, and whereunto he was thereby charged, and that
tho he was once charged therewith, yet at the time of the
Account he was not, because when he came home he found
that his Servant had paid the 200*l.* to the Defendants
Testator, and that it was so entred in his Account-Book,
but when he made the Account he had not his Books.

The Defendant by way of Plea saith, It was a stated
Account, and the Ballance thereof secured by Writing
under Hand and Seal; and that he being but an Executor,
knew not how to account; and set forth, that he believed
that his Testator upon his Accounts delivered up his Notes
and Vouchers, and that no stated Account could stand in
Court, if this or that particular of it should be questioned.

Plea over-ruled
with this, that
the Plaintiff pro-
ceeded no farther
than Answer
without leave of
the Court.

By Lord Keeper over-ruled the Plea, and cited Backwel
and Squires Case: But to proceed no farther than Answer,
without leave of the Court.

Fowle *against* Green. June 17.

Heirs shall join
in sale for Debts.

J.S. testeth in Fee deviseth the Lands to his Executors to
sell, and pay Debts. The Heir shall be compelled to
join in the sale. And the Lord Keeper said, it was so ruled
in Parliament.

Terrel *against* Page.

All my Estate in
a Will passeth a
Fee.

A Devise of Divers Legacies in Money; and then a
Devise followed of Lands. All the rest and residue
of my Money, Goods and Chattels, and other Estate
whatsoever, I give to J. S. whom I make my Executor, he
having other Lands. Decreed by the Lord Keeper that the
other Lands do pass.

D E

Term. Sanct. Mich.

Anno Regis 27 Car. II.

I N

CANCELLARIA.

Smith *against* Ashton, November 15.

J. S. seized of Lands in two Counties, conveyed part to the use of himself for life, with Remainder, and power to charge the Lands so conveyed, with 500 l. by Deed or Will in Writing under his Hand and Seal. This Conveyance was voluntary, and without valuable consideration, and after by his last Will in Writing, not sealed, devised the 500 l. to his younger Children, in whose right the Bill is exhibited against his Son and Heir to have the 500 l. Power not pursued decreed.

Against which the Counsel for the Defendant insisted, that the Law was against the Plaintiff; and both Parties claiming under a voluntary Settlement, and the same consideration, (viz.) Natural Affection, therefore he that hath the Law on his side ought not to be charged to the younger Children.

The Lord Keeper took time to deliberate, and now decreed the 500 l. tho the Will was not under Seal, and the power not legally pursued. He cited Prince and Chancellors Case, Decreed by the Lord Egerton, where there was a Power to make Leases on a Covenant to stand seised to uses, on consideration of Natural Affection, and the lease was for provision for younger Children.

Decreed

Decreed good against the Heir, for two Reasons, 1st. For that the Law was not then adjudged in Mildmays Case. 2d. Because the Son did claim by the same Conveyance by which the Power was limited. So 17 June, 8 Car. the Jointure of the Countess of Oxford decreed good, where the Power was not pursued; yet only part of her Jointure depended on the question.

For he that reserveth such a Power under Circumstances, they are but Cautions that another might not be imposed, or made without him. The substantial part is to do the thing, and therefore where it is clear and indubitable, the neglect of the Circumstances shall not avoid the Act in Equity; possibly when from home or sick he remembered not the circumstance of his Power; and the Powers of this kind have a favourable construction in Law, and not resembled to Conditions, which are strictly expounded; for a Power of this kind may be executed by part, and extinct in part, and stand for the rest; but a Purchaser shall defend himself in such Case, but with difference, though not executed according to the Circumstances; for if he hath notice (quære if he meant of the Original Conveyance only, or of the ill executed Estate) he purchaseth at his own peril.

Smith against Ashton. November 15.

Power not ob-
served in Cir-
cumstance, de-
creed.

Ralph the Grandfather of the Defendant, an Infant, had power by deed, or Will under Seal, to charge Lands in Yorkshire, (which by the same Conveyance he intailed on the Heirs Males) with Monies, not exceeding 500 l. He sent Notes in Writing to J. S. to draw a Conveyance to Feoffees, but with Blanks for their Names, thereby to charge Lands in Cheshire, called Wymondslly, with 1500 l. Portions for younger Children; and if they sufficed not for 1500 l. to charge the Yorkshire Lands with what was deficient. Deeds were prepared of Conveyances accordingly, and ingrossed, but before they were sealed or Names of Feoffees inserted, he died. Richard his Son and Heir, Father of one of the Defendants upon Marriage with Beatrix, and 500 l. Portion, settled the Copphold Lands on Beatrix, with an Intail to the Heirs Males of that Marriage, and dies. The Bills by the younger Children for their Portions, having no

no other substance, nor e contra, Beatrix and her Son any at present. if the Plaintiff prevail.

The Bill charged the Notes in Writing to be the last Will of Ralph the Grandfather, but no mention in the Notes of any Reference of a Will, but a Conveyance, and a Conveyance prepared, but no Will.

On the first Hearing direction was given for a Trial at Law, whether the Notes were part of the last Will of Ralph, and a Verdict passed, that they were.

The Cause coming again to be heard, the Chancellor took time to advise, and now decreed the Cheshire Lands to be sold for payment of the Portions, and immediate possession thereof to the younger Children, and the Infant to be charged out of the Yorkshire Lands so far as 500 l. if the Cheshire Lands sufficed not by sale.

1. Note, This was Decreed, though the power of charging, was not observed in the Circumstance.

2. Note, A Will, and no Writing, mentions it to be so.

Anonymus. November 25.

A. Executor temporary, and after B. to be Executor. A. proved the Will, his Executorship ceased. B. might sue without other Probate of the Will by him, by the Opinion of the Lord Keeper. And the Cause proceeded accordingly to a Decree of an Account. Executor Temporary.

Bullock against Knight.

Bullock for a Marriage to be had between Henry his Son, and Bridget the Daughter of Knight; and being possessed of a Lease of one thousand Pears, articulated to settle those Lands in consideration thereof, to the use and in trust for himself till the Marriage, and after the Marriage to the use of himself for life, and after his death to Henry for his life, and after to the use of Bridget for her life, and after their deaths to the use of the Issue of their two Bodies to be begotten, according to the descent of Lands so intailed. The Marriage being had, the Lease was assigned to those uses. Then the

In

Father

Father being dead, Henry the Husband granted his Interest over and dieth. Bridget surviveth and dieth. The Defendant takes Administration of Bridget. Bullock the Father was dead at such a time as Henry made his Grant. The Assignee sueth for the benefit of the Trust. And the dispute on Plea and Demurrer was, to which the benefit of the Trust belonged? There is no Issue living; but as I take it there was Issue born, but dead. And the Plaintiff made Title as Administrator also to the Issue.

Trust of a Term
for a Feme Co-
vert.

First, Sir John King for the Plaintiff objected, That the Trust of a Term limited to a Feme Covert was disposable by the Husband, and did bind the Wife for the Trust; for the Trust of a Term shall be of the same nature as the Term is.

Lord Keeper. I should not doubt if a Feme have the Trust of a Term for Years, and marrieth, but to decree it to the Alienage of the Husband (sed quære it to the Alienage; but it seems it must be to execute the Decree to the Husband, and then the Husband may alien; but the Lord Keeper said as before) When a Term is settled for the Maintenance and Jointure of the Wife, the Husband shall never bind the Wife by his Alienation.

Trust of a Term
to Issue.

2dly. It was debated, Whether the Trust limited to the Issue were here in nature of a Limitation, or by way of Purchase, so as the Issue born had then an Interest vested in him? For the Wifes Administrator could have no Title.

It was press to be a Limitation, not a Purchase, the rather for these words, In course of descent.

Lord Keeper. An use to the Husband and Wife, and after to their Issue, they then having none, is all one as if limited to them and the Heirs of their Bodies; and the Issue takes nothing as a Purchaser.

3dly. Yet then it was objected by Sir John King, that the Husband may alien his part; but it was not to my intention fully enough press that here the Articles were made before the Marriage, and consequently they took by divided moieties.

The Lord Keeper ruled the Plea good.

Jefferson against Dawson.

On a Plea.

Purchaser of Lands incumbered with a Statute, pur-
chase in a precedent Statute, having no notice of
the first Statute. Purchase pro-
tested.

Lord Keeper. If he had notice of the second Statute before he was dist in the Purchase, he shall defend himself by the first Statute, whether the same were paid off or no; if he can at Law do it, Equity shall not help him.

Anonymus.

Prat devised his Houses in Sepulchres Parish to St John's Colledge, he being Tenant in Capite, and the Corporation misnamed, which was a void Devise as to pass the Lands, and so on former Proceedings certified by the Opinion of the Judges. Devise void by
misnomer of
Corporation,
supplied in E-
quity as a good
appointment of
a Charitable Use

The Lord Keeper notwithstanding decreed it a good appointment for a Charitable Use, within the Stat. of 43 Eliz.

But then it was objected, that if so, yet then the Process and Method appointed by the Statute ought to be held, (viz.) A Commission and Inquisition, and Decree by Commissioners, and so to come at last to a final Decree by the Lord Chancellor or Lord Keeper, but not to sue by Original Bill, as in this Case.

But the Lord Keeper decreed the Charity, though before the Statute no such Decree could have been made. Relief upon the
Statute of Cha-
ritable Uses by
Original Bill.

Then the Defendants claiming not only as Heirs at Law, but by a Title paramount the Devisor, It was decreed against him as to any Title under the Devisor, but not against the other Title.

But it was farther decreed, that at any Trial at Law he should not insist or give in evidence the invalidity of the Devise. Referred to
Law, and order-
ed, That the De-
fendant do not
insist on a Title
set aside by the
Decree: He does
insist on it.

The Prosecutors for the Charity brought an Action at Law in the Common Pleas, where they made Title by the Devise; the Council for the Defendant not being informed before of the Decree, insisted that the Decree was void.

¶ In 2

Where-

Whereupon the Plaintiff read the Decree, and the Plaintiff was non-suited, and then moved the Court of Chancery for a Commitment of the Defendant and establishment of the Possession, which was ordered, nisi causa.

For cause it was shewn; That the Trial was voluntary, and the Court had ordered no Trial, and the Defendants Counsel were not appyled that the Defendants had been served with the Decree, and were willing to go to a new Trial on the other Title, and prayed farther time to shew cause because of the shortness of the time given to shew cause.

Lord Keeper, You labour to get an Appeal to the King, and so to delay; Let the Order stand.

Clifford against Asbley, and others.

Fine and Non-
claim bars a
Trust.

George Low the Father being indebted 3000 l. for Profits of Lands which he received, by his Will devised, that if his Personal Estate fell short, that his own Lands in the Counties of Wilts, Hereford and Lincoln should be liable to make satisfaction. There was a Decree against George Low the Son for satisfaction out of the Lands, and he being dead, a Subpœna in the nature of a Scire facias is brought against the Defendant as Tenant. And all the Defendants but Asbley, as Tenants of the Lands to George Low, plead inter alia, that they are several Purchasers for a valuable consideration by Fine with Proclamation, after a Decree and Non-claim, without notice. And whether this was a good Bar was the question, and long debated.

Jones 14 Car.

Lord Keeper. 1. A Fine with Proclamation and Non-claim will bar a Trust, and so it was resolved in the Exchequer.

Entry on the
Land by a cestui
que trust is no
sufficient claim.

2. And an Entry on the Land by a Cestui que trust, is no sufficient claim, but it must be by Subpœna.

3. But there is a Decree which is more than a Trust. And put case that a Man have a Judgment on Debt at the Common Law, on which he may have an Elegit. The Defendant after Judgment alienes the Lands by Fine and Proclamation, and five Years pass; the Plaintiff may have a Scire facias and Elegit; and why not? So here I answer, That in case of a Statute, or Judgment the Plaintiff

Plaintiff or Cognizee had no Interest in the Land; for if he release all his Right to the Land, yet he may sue Execution on the Land.

Much was said on the other side touching the inconvenience and ill consequence; on the one hand how dangerous it would be for Purchasers, and how much the Statute of Fines would be weakened; on the other side, how Decrees would be weakened.

The Lord Keeper took time to advise.

But Asbleys Plea was allowed, because as to the Lands, viz. Fisherton Ager which he claimed, George Low Party to the Fine was but Tenant in Tail, the Remainder over to his Brother, under whom Asbley claimed by fine without notice of the Trust or Decree.

Man against Cob.

THE Plaintiff Lord of the Manor of Finchley presents himself Lord, and seised of Rents of the Defendants as Tenants of the freehold. A Trial created and found for the Plaintiff, and decreed that the Tenure and Scisin be admitted without farther Trial.

Tenure and
Scisin of Rent
admitted at a
Trial.

Lord Keeper. Tenants use their Landlords badly now.

Anonymus.

THE Inhabitants of Sutton Cofield were incorporated by H. 8. and the Manor and Park granted to them in Fee, by the name of the Warden and Assistants, and the Grant was made to them; and it appeared by the Grant, that the same was for the benefit of the Inhabitants for ease of Taxes, and relief of the Poor.

Grant to the
Warden and
Assistants for
benefit of the
Inhabitants,
They cannot
let without the
Inhabitants.

A Suit was in the Star Chamber touching misemployment and enclosing the Lands, whereby the Inhabitants were prejudiced; and there decreed that no farther Enclosure should be made without consent of the major part of the Inhabitants.

In King Charles the firsts time some of the principal of the Inhabitants, Mr. Pudsey and others took a new Charter, leaving out the Inhabitants; and now the Warden and twenty three more made Leases, and Inclosures without consent of the major part. And the Plaintiff an Inhabitant

tant on behalf of himself and the rest of the Inhabitants do complain.

And the Lord Keeper decreed against the new Leases and Inclosures, and that no such should be without consent of the major part. And on Rehearing confirmed this Decree; for tho the Administration was in the twenty four, yet the Benefit was for the Inhabitants in general; But it was pressed much that the twenty four were the Corporation, and the Interest in them, and they might alien the Estate, and a fortiori Lease and Inclose; and it would breed contention and confusion if that the Multitude must intermeddle.

Anonymus. December 14.

Statute lost, not
to be helpt by
Motion, but
Bill against all
Parties.

The Lord Keeper was moved touching a Statute lost to have it certified; and two Presidents were shewn. Lord Keeper. They are Presidents not to be followed, and I will never do it. Exhibit your Bill against all that are concerned in the Land, and Justice shall be done you.

D E

Term. Sanct. Hill.

Anno Regis 27 & 28 Car. II.

I N

CANCELLARIA.

Cornish against Mew. January 28.

Cornish sold in Fee devised Lands to A. for life, Ant. 224. Remainder to B. in Fee. The Lands were before the Devise mortgaged in Fee for 100 l. and he made A. Executor, and left Assets enough to pay the Debts which B. in Remainder prayed it might go to the payment of the Mortgage, as in Case of the Heir, who should be relieved upon the personal Estate in such Case. Difference between the Heir of a Mortgagor being relieved upon the personal Assets, and a Devisee in such Case.

But the Court took a difference; there indeed the Heir shall be relieved, but not a Devisee; and decreed Tenant for life should be decreed one third, and he in Remainder two thirds, to redeem. Tenant for life decreed one 3d. and he in Remainder two thirds, to redeem.

The same day another Case, where a Joyntress was of Land mortgaged, between Bertue and Stile, decreed that the Joyntress paying the Mortgage, she should hold over till she and her Executor should be repaid with Interest. A Joyntress paying off a Mortgage, decreed to hold over till she be satisfied.

Brown

Brown *against* Vermuden. February.

Where a Parish is sued, and four named to defend, and a Decree against them, one who claims under none of the four, contests the Decree.

Brown, Vicar of Worselworth, sued a Scire Facias and by Subpœna to have Execution of a Decree had by and on the behalf of one Carrier, his Predecessor for the tenth Dick of Lead-Oar in the Parish, at the charge and labour of the Miners there (viz.) the Vicar to pay one penny a Dick. Carrier his Predecessor sued divers Miners there, grounding his Suit by Prescription. Four Persons were named by the Miners to defend the Suit for them, and a Decree passed against the four, for Carrier and his Successors, that the Defendants and all the Miners should pay. Vermuden, who owned and wrought a Mine there being served, appeared and insisted that he is not bound by the Decree, for that he was not party or prap, nor claimed under any who was; and if he should be bound, then the Parson ought to be bound, if the Decree had been against the Parson, which could not; because the Parson nor Ordinary were no Parties, and the Defendant could have no Bill of Review of it if it be erroneous, and therefore ought not to be bound.

Where a Parish is sued, four named to defend, and a Decree against them, one who claims under none of the four contests the Decree.

The Lord Chancellor. 1. If the Defendant should not be bound, Suits of this nature, as in case of Inclosures, Suit against the Inhabitants for Suit to a Mill, and the like, would be infinite, and impossible to be ended. And declared, that the Defendant, though no Party nor prap, yet he may have a Bill of Review, because he is grieved by the Decree.

2dly. The Defendant insisted on the Jurisdiction of the Dutchy Court, the Parish being part of the Dutchy, and the King had Cap. and Lat. as in Right of a Dutchy, and a Court of Revenue.

The Chancellor. It is within the County Palatine; this Court may hold Plea of Lands in the Dutchy.

3dly. The Court who made the Decree held the 1 d. per Dick too little, and ordered a Commission to settle some more reasonable recompence to the Miners, which never was executed. Non allocatur.

4. Sir John Heath was Tenant in Common with Vermuden, who ought not to be prosecuted alone. But the Defendant notwithstanding was ruled to perfect his Answer to the Interrogatories.

The Lord Chancellor. The Question is, Whether the Decree while it stands should be obeyed, not whether it be well made?

..... against Hawkes. February 11.

Hawkes in his Purchase had Notice of the Plaintiffs Annuity, for it was excepted in his Deed of Purchase, which contained part of the Lands charged, and divers other Lands. After Hawkes sold the other Lands not charged, and also some few Acres of the Land charged by general Words, and desired the Plaintiff and her Husband to join in a Fine to the person who bought them, and was assured by Hawkes, that the same would not prejudice her in the Lands settled on her: But this was proved by one witness only, and his Depositions uncertain as to the particulars.

Relief for an Annuity against a Purchaser.

Also it was proved, that another person had also bought, and was in possession of three Acres of Land charged, and was no Party to the Bill; and that no Relief ought to be in Equity, because the Extinguishment of the Rent being a Rent Charge was by the Plaintiffs own Act by a Fine. And however Hawkes could not be charged, there being no Appointment to be made, the Tenant of the three Acres being no Party to the Bill.

Rent Charge not extinguished.

The Lord Chancellor. There was no consideration for the Rent, and no Agreement to extinguish it; and when the Land was sold, it was sold for 800 l. of which 700 l. was paid to Hawkes. The Widow was circumvented, and decreed Relief against Hawkes.

Richardson against Louthier. February 12.

Certain Exhibits of Writings were given in it at a Commission for Examination of Witnesses. The Defendant suggested that the Exhibits were altered and terminated since the Commission executed, and prayed a Commission to examine that Point.

The Exhibits after Commission.

It is

Objection.

When the Party hath a Commissioner present, he can never examine new Interrogatories by Commission as to the Merits.

Objection. When the Party hath a Commissioner present, he can never examine new Interrogatories by Commission.

Resp. True as to the Merits. But this hath happened once, and not examined to by the Commissioner, not being then in being.

Object. How could the Defendant know this, but by discovery of his Commissioner, who ought not to discover the Examination?

But yet the Lord Chancellor ordered a Commission.

Taylor against Debar, &c. February 24.

A bad Title sold with Covenant for further assurance, and afterwards the Vendor purchaseth the good Title.

A Purchaser of the Crown Lands in the time of the late Wars, sells part to the Plaintiff, and covenants to make further assurance. He on the King's Restitution for 300 l. had a Lease for years made to him under the King's Title. The Decree was, he should assign his Term in the part he sold.

DE
Termino Paschæ
Anno Regis 28 Car. II.
I N
CANCELLARIA

Anonymus. April 30.

A Creditor offered Proof of his Debt to the Commissioners of Bankrupt, which they disallowed. Proof of a Creditors Debt disallowed by Commissioners, the Court will hear the proof. Distribution was not yet made. It was alledged that the Proof was sufficient, and moved that the Lord Chancellor would be attended by both sides to hear and give Order therein.

The Lord Chancellor. Why should I not leave it to the Course the Statute hath provided ? If it be granted in one, it will be asked on all Cases. Yet at last it was ordered.

Whitton against Lloyd. May 1.

A. Deviseth his Lands to his Executors towards payment of his Debts and Legacies. Le. Debts before Legacies where Lands are devised. The Lord Chancellor. Debts must be paid before Legacies : And decreed his Debts to be fully paid before his Legacies, and took a difference between such appointment made by Conveyance, and by Will.

Waller against Dalt. May 1.

A young Gentleman takes up Wares, &c. and relieved.

WALLER a young Gentleman and two others employed one Willis to borrow 500 l. Willis employed Wiltshire who spoke to Dalt a Silkman, and bought of him Silks for 500 l. The Plaintiff gave Bond and Judgment for the Money. Wiltshire sold the Silks for 250 l. and kept 50 l. for his and Willis's pains, and paid 200 l. to the Plaintiff. The Defendant never treated with the Plaintiff. And denied on Oath that he ever treated about the Loan of Money, and deposed the Silks to be of 500 l. value or thereabouts, but Proof to the contrary.

Decreed only 200 l. and Interest (Quare for the Interest) and Relief against the Defendant quoad resid.

D E

Term. Sanct. Trin.

Anno Regis 28 Car. II.

I N

CANCELLARIA.

Bullstrode against Lechmore. June 4.

The Bill was to discover an ancient Deed of In-
 tassel supposed to be in the Defendants hands, and
 that he had perused it, and that in discourse he had
 acknowledged such Deed and other like Charges.

The Defendant saith by Plea, that he was a Counsellor
 with A. B. That on a Reference between the Parties, it
 was agreed that nothing that passed then, should be made
 use of on either side, or be disclosed.

The Lord Chancellor ordered that what the Defendant
 knew only as Counsellor, or under such Contract of silence,
 he should not be put to answer.

Moor against Blagrave. June 9.

A Legatee of a Term sued for it, but made not the
 Executor Party, and therefore the Bill was not good
 though the Executor to the Legacy was alledged in the Bill
 to consent by the Plaintiff Assignee of the Legacy.

Legatee of a
 Term sues, and
 the Executor no
 Party, not good,
 though charged
 that the Execu-
 tor had assented.

Salisbury

Salisbury against Baggot. June 23.

Sir Will. Jones
Rep. 416.

Among many other Questions, which arose in the Case, some were about the operation of a Fine with Proclamation and Nonclaim thereon, of which the Lord Chancellor having heard the Cause several days, took time to advise, and now declared his Opinion at large.

The Bill was to have Articles made on good and valuable consideration sixty years before decreed, by which the Lands in Question were to be settled on A. the Father for life, Remainder in Tail to him whose Son and Heir the Plaintiff is.

Fine and Non-claim.

The Defendants insisted on a Fine and Nonclaim, which the Plaintiff would inter alia avoid by Infancy of himself and of his Father, and of Entry made by himself within five years after the death of A. who was Tenant for life.

The Lord Chancellor in several other Points touching Notice, &c. was of Opinion for the Plaintiff, but dismissed the Bill on Consideration of the Fine.

Fine and Non-claim bars Equity and Trusts, i. e. where the Lands only are charged. But where the Lands are charged in respect of the person it bars not.

1. That a Fine and Nonclaim bars all Trusts and Equity, and so it was resolved by all the Judges between Cary and Sir Thomas Thynn, where the Equity was of a practice in gaining a Conveyance of Lands, and since resolved in the Exchequer, where a Trust was barred, else no Man could know when he was sure of an Inheritance: But this is on two differences:

1st. Where the Equity chargeth the Lands as in the aforesaid Cases, there the Fine bars; but where it chargeth the person in respect of the Lands it doth not bar, as in the Lord Knowl's Case, wherein a Fine and Nonclaim barred not.

That Fine can never bar the Equity or Trust which it creates. Claim of an Equity to avoid Fine can be no otherwise but by Subpoena.

2dly. If the Equity or Trust be created by the Fine, that Fine shall never bar the Equity which it created. But the Objection that there is a Claim within the five years of the death of the Tenant for life, by the Issue in tail, helps not, in respect of the manner of Claim; for the Claim is to be of an Equity which can be made no other way but by Subpoena. In Cases of lawful Entry or Action Equity makes not an Entry lawful. Entry of an Issue after Discontinuance is no Claim, but it must be by Formedon; the Statute hath taken away the Claim at Common Law sub pede Finis.

2. The

2. The Claim in Equity in this Case is to have an Assurance or Conveyance made, which the Father of the Plaintiff might have sued for, being long ago, and that being vested in the Father, his Nonclaim thereto shall bar his Son the Plaintiff. But if the Conveyance had been made, then the Entry of the Plaintiff had been a good Claim to avoid the Fine, for no Man shall be enforced to take advantage of a Forfeiture. It is time enough for him in Remainder to enter after the death of Tenant for life. But here is no Title to the Lands, but an Equity to have the Conveyance of the Lands settled on a Lease for life, the Remainder in tail.

Quære. If the Party, who should make the Settlement, should die without Heir, or the like? And Quære, If one be entitled to have the Land conveyed, have not a Title to the Land in Equity?

Clotworthy against Mellish. June.

Plea to part, and Demurred to part; the Plea over-ruled. Then the Defendant answered, and that being insufficient he put in another Answer, and that reported insufficient, he put in a fourth Answer: If the first be accounted one.

A Plea and three insufficient Answers, whether to be examined on Interrogatories.

The Lord Chancellor did not commit him to be examined on Interrogatories.

Cavendish against

Matters in difference referred by Consent and Order of the Court to Mr. Birch and two others, or any two of them. Two made the Award, and now Exceptions were taken to the Award on the one side, and the other side moved it might be decreed.

No Relief against an Award made without Order of Court unless for Corruption.

The Lord Chancellor. If the Parties without the Court refer the differences, they chuse their own Judges; and this Court relieveth not against the Award, unless it be in a Case of Corruption, exceeding Authority, or the like. But when a Reference by Consent and Order of Court, if it appear unequitable, this Court will not decree it. And accordingly in this Cause set aside the Award and Bond of Submission. The reason was, because it concerned

Exceeding Authority, &c. for there the Parties chuse their own Judges; but if by Consent and Order of Court it shall be set aside if unequaltable.

Award that it shall procure the Infant to convey when at Age, set aside, because unreasonable.

The Court will decree no award to bind an Infant.

cerned an Infant, to whom 450 l. was awarded; and that Bond should be given by the Guardian, that the Infant should at his full age convey the Lands in Question, which is not reasonable; for he may dye; or if he live to age, refuse to convey; so it is not mutual.

The Lord Chancellor also said, He would never decree an Award which should bind an Infant.

Popham against Sir John Hobert, Nephew of Sir John Hobert deceased

Lands settled in Fee on Trust, to sell so much as the Trustees should think fit for payment of Debts and Legacies, and the Overplus to his Daughters and her Executors.

1. Whether the Trustees can sell more than is sufficient.
2. The Daughter being dead without Issue, whether the Lands belong to her Administrator or her Heir.

THE Case was, Sir John Hobert had two Daughters, Dorothy (married in his life time to Sir John Hele, whose Grandchild and Heir the Plaintiff married) and Philippa. And having such Issue, settled divers Lands in Norfolk on Trust in Fee, that they and the Survivor of them within two years after his decease should sell, as they should think fit, and that the Monies raised by Sale, and the Profits in the mean time should be employed towards payment of his Debts and Legacies that should be left unpaid by his Executors; and the Overplus, after such Debts and Legacies paid, to such persons as he should appoint by his Will; and in default of such appointment, to Philippa and her Executors, which he after by his Will confirmed, and dyed in 1647.

Philippa married the Defendant in 1647. and after her Fathers death had Issue by him, and dyed, and then the Issue of Philippa also dyed an Infant without Issue.

The Defendant took Administration to his Wife. The Trustees had paid off some Debts and sold some Lands; some Lands remained unsold, and some Debts unpaid. The Defendant obtained from the Trustees a Conveyance of the Lands because the Surplusage of the Money of the Lands sold was to go to his Wife, her Executors and Administrators.

The Plaintiff and his Wife as Heirs to the Testator, and Philippa the Wife prayed an Account, and to have the Lands unsold. To which the Defendant pleaded the Matter.

The Lord Chancellor ordered the Matter to be put in by way of Answer.

Reasons

Reasons against the Plea were urged.

1. The Lands are not appointed to be sold absolutely; but to be sold as the Executors should think fit, which is all one as if it had been sold, if they find occasion for payment of Debts and Legacies. But in such Case they have not a pure and absolute Power and merely Arbitrary, but subject to the Rules and Laws of Equity; for in case the Estate personal would suffice to pay the Debts, they may not sell the Land and pay the Debts with that Money, and keep the personal Estate to themselves.

Power to sell
Lands subject to
the Rules and
Laws of Equity.

2dly. And as they are restrained from selling in case the personal Estate can pay all, so if it will pay part proportionably according to reasonable circumstances, in that Case they may sell, and not otherwise. Quære therefore if the Executors should not be made parties.

3dly. When Philippa the Wife died, the Surplus of necessary Sale will belong to the Administrators; but it did not lie in the power and election of the Husband, her Administrator or Trustees to sell without necessity, and thereby to give in effect the value of the Lands, or the Lands themselves from his Child that survived her, and was Heir to the Husband, and thereby disinherited the Child, and in effect intitled the Administrator to the Lands by way of Bargain.

4thly. Put case the Husband had died before the Wife, and a Collateral Kinsman had taken Administration to the Wife dying after her Husband, he might as well have done it as now the Husband has done, he could not with any colour have had the Lands, and the Husband hath no other Title, but what such Stranger should have (viz.) as Administrator, not as Husband.

5thly. No Administrator in such case is to be preferred before an Heir. The Heir shall enforce the Administrator to preserve the Inheritance from Sale by the Personal Estate to pay Debts.

Objection. The Name is preserved, she marrying a Hobert

Answer. The Marriage was two Years after the Testators death, and therefore could be no consideration of this Bequest; for she might have married any other Person, and such Husband should have as much right as Sir John Hobert.

The Title that the Son had while he lived, descends to the Plaintiff as his Heir, and did so descend before the

D o

trans-

transaction between the Defendant and the Trustees, and the Trustees might not make then whom they pleased Heir to the Lands.

The Husband without a fine by the Wife, could not bind the Wife and her Heirs to take from her the power to clear the Estate by payment of the Debts, nor consequently to bar her Heir thereof.

Brown against Vermuden.

Tithe of Lead
Oar.

BROWN Parson of Worselworth exhibited a Bill against Vermuden to have performance of a Decree obtained against certain Persons Workmen and Owners of Lead Mines in Derbyshire, whereby a certain manner of Tithing of Lead Oar was decreed, not only against the particular Persons named Defendants, but all other Owners and Workmen.

Vermuden pleaded inter alia, That he was a Stranger, and claimed not under any Party or party to the Bill, and therefore insisted he ought not to be prosecuted by a Bill not grounded on the fact and Title, but on the Decree in the nature of a Scire facias.

This Plea was formerly over-ruled by the L. Chancellor, vide fol. 272. But a Commission granted to examine the quantity and value of the Oar, and the Plaintiffs Title, to Parson, &c. The Six Clerks appointed time and place, but the Defendant's Witnesses were so aged, that they could not come to the place, and therefore a new Commission prayed.

Commissioners
adjourn.

Lord Chancellor. The time and place is only for the first meeting of the Commissioners; but after they may adjourn to another time or another place.

The Lord Keeper Finch.

Giles Thornbrough Clerk, and Jane his Wife,
Daughter and Heir of Lawrence Clifton Gent.
Plaintiffs, John Baker Son and Heir of James
Baker, and John Nichols Esquire, and Sarah
his Wife, Administratrix of James Baker Defen-
dants. July 10.

THE Plaintiffs Bill being, That the said Lawrence Clifton by Indentures of Lease and Release between him and the said James Baker, bearing date the 20th and 21th of October 1656. in consideration of 500 l. paid to him by the said James Baker, did convey to the said James Baker and his Heirs several Lands in Stoak in the County of Surry; and by another Indenture executed at the same time between the same Parties, it was agreed between them, that if the said Lawrence Clifton should during his life pay to the said James Baker, his Heirs Executors, Administrators or Assigns 30 l. yearly at Lady-day and Michaelmas, or within thirty days after, by equal portions, and if the Heirs of the said Lawrence should within six months after the death of the said Lawrence pay to the said James Baker, his Heirs, Executors, Administrators or Assigns, the Sum of 500 l. with Interest since the paying the last 15 l. then the Lease and Release should cease and be void; and about one Year after the said Lawrence Clifton died, leaving the said Jane his only Daughter and Heir: And by another Indenture bearing date the 25th of May 1658, made between the now Plaintiff and the said James Baker, did covenant with the Plaintiff, that if they or either of them should pay to the said James Baker, his Heirs, Executors, Administrators or Assigns the Sum of 20 l. only on the 20th of October then next following, and the Sum of 530 l. on the 20th of October 1659, that then the said Indenture of Lease and Release should be void: And the said James Baker died about May 1659, and the Premises being confessed, they descended to the said Defendant John Baker, Son and Heir to the said James; and the Defendant Sarah, the Relict of the said James Baker, having administered of

his Estate granted to her, her said Husband John Nichols, and she does pretend to the said Mortgage, and the Plaintiff paying a Reconveyance on payment of what was due, the Defendant John Baker by his Answer confessing the Mortgage and Agreement aforesaid, and that the Mortgage being forfeited descended upon him as Heir to his Father, and submitted to reconvey the Premises on payment of Principal, Interest and Costs to him, the Defendant and John Nichols and his Wife confessing the said Mortgage, and insisting that the said Sarah was Administratrix to her former Husband, and thereby intitled to the said Mortgage Money and Interest, although he hath other Assets of her Husband's Estate, with a considerable overplus.

It was upon the hearing of the Cause the 11th of February in the twenty third Year of his now Majesties Reign, decreed by the Master of the Rolls, That upon payment of Principal, Interest and Costs, The Defendant John Baker should reconvey the Premises. And it was then farther ordered, that the Party should attend the Right Honourable the Lord Keeper of the Great Seal of England for his Lordships Directions, Whether the Principal and Interest should be paid to the Defendant John Baker the Heir, or to the Defendant Sarah, the Relict and Administratrix of the said James Baker; Since which the said Principal and Interest having been paid by the Plaintiff, and a Reconveyance made unto them, but the question between the Heir and the Administratrix being not settled, Now upon hearing and full debating of the matter this present day by Counsel learned, as well for the Heir as the Administratrix, whether the said Principal Money and Interest doth belong, and ought to be paid to the Heir or Administratrix, and the former Presidents being produced, the Lord Keeper having been attended with the said Cause and Presidents, and having taken time to consider thereupon, did now declare, that the Mortgage ought to go to the other Defendant John Nichols and his Wife, the Administratrix of James Baker, and not to John Baker Son and Heir of the said James Baker; because the Reason of the Common Law in these Cases ought as near as may be to be followed in Equity. Now by the Common Law, if the Conditions of Defeasance of a Mortgage of Inheritance be so penned, that no mention is made either of Heirs or Executors to whom the Money should be paid, in that case the

*Equitas sequitur
Legem.*

the Money ought to be paid to the Executor, in regard that the Money came first out of the Personal Estate, and therefore usually returns thither again; but if the Deforcance appoints the Money to be paid either to Heirs or Executors disjunctively, there by the Common Law if the Mortgagor pay the Money precisely at the day, he may elect to pay it either to the Heirs or Executors, as he pleaseth: But where the precise day is past, and the Mortgage forfeited, all Election is gone in Law, for in Law there is no redemption. Then when the Case is reduced to an Equity of Redemption, that Redemption is not to be upon payment to the Heirs or Executors of the Mortgagor at the Election of the Mortgagor, for it were against Equity to revive that Election, for then the Mortgagor might defer the payment as long as he pleaseth, and at last for a composition by payment of the Money to that Hand which will use him best, much less can the Court elect or direct the payment where they please, for a Power so Arbitrary might be attended with many inconveniencies throughout. Therefore to have a certain Rule in these Cases, and a better cannot be chose than to come as near unto the Rule and Reason of the Common Law as may be. Now the Law always gives the Money to the Executor where no Person is named, and where the Election to pay to either Heir or Executor is gone and forfeited in Law, 'tis all one in Equity as if either Heir or Executor were named, and then Equity ought to follow the Law and give it to the Executor, for in natural Justice and Equity the principal right of the Mortgagor is to the Money, and his right of the Land is only as a security for the Money; wherefore when the security descends to the Heir of the Mortgagor, attended with an Equity of Redemption, as soon as the Mortgagor pays the Money the Lands belong to him, and only the Money to the Mortgagor, which is merely personal, and so accrews to the Executors or Administrators of the Mortgagor. And for this reason a Mortgage of an Inheritance to a Citizen of London hath been held to be part of his personal Estate, and divided according to Custom. And tho it may seem hard that the Heir should part the Land, and be decreed to make a Recompence without having the Money which comes in lieu of the Land, yet it will not seem so to them who consider that the Land was never more than a Security, and that after payment of the Money the Law keeps a Trust for the Mortgage which the Heir of the Mortgagor is bound to execute; and his Lordship

Where the Mortgage Money shall be paid to the Heir or the Executor, in Law or Equity. Elective.

The nature of a Mortgage.

Mortgage of an Inheritance to a Citizen of London part of his Personal Estate.

Difference between Mortgage and an absolute Conveyance with a Collateral Agreement to reconvey.

Mortgages lookt upon as part of the Personal Estate.]

His Lordship declared that the Right to a Sum of Money, which is a Personal Duty, ought always to be certain, and not to be variable upon circumstances. Wherefore his Lordship did not think it material that the Administratrix in this Case had Assets without this Money, for Assets or not Assets is not the measure of Justice to Executor or Administrator, but serves only as a pretence to favour the Heir, who either ought to have the Money if there be no Assets, or not to have it tho there be Assets. And for the same reason his Lordship did not think it material that there wanted Circumstances of a Personal Covenant from the Mortgagor to pay the Money, for tho the Case of the Administratrix of the Mortgagor had been stronger with it, yet it is strong enough without it. His Lordship declared that he had considered the various Presidents in this Case which had been urged, whereof not one did come to the very point, there being a great difference between a Mortgage and an absolute Conveyance with a Collateral Agreement to reconvey upon repayment of the purchase Money, the other late Presidents which made for the Heir being contrary to the more ancient Presidents of this Court, and to some Modern Presidents also, which seemed to his Lordship of more weight, his Lordship being of Opinion that all Mortgages ought to be looked upon as part of the Personal Estate, unless the Mortgagor in his life-time, or by his last Will do otherwise declare and dispose of the same. Wherefore, and upon the whole matter, his Lordship having fully weighed the Presidents, and what was said on either side, doth order and decree that the Mortgage Money and Interest shall be paid unto the said John Nichols and his Wife, and kept by them, and that what Security hath been given by either of them concerning the disposing of the said Monies and Interest, or the abiding the Order of this Court, as to the payment of the said Money and Interest, be delivered up to them and cancelled.

D E

Term. Sanct. Mich.

Anno Regis 28 Car. II.

I N

CANCELLARIA.

*Bisco against the Earl of Banbury, Son and Heir
of Nicholas Earl of Banbury. 24 October.*

On hearing the Cause by Appeal from a Decree
formerly pronounced by the Lord Chancellor.
The Case was,

Edward Lord Vaux, Father of Nicholas Earl
of Banbury, on the Marriage of Nicholas his Son Earl of
Banbury, and Elizabeth Wife of the said Lord Vaux, Fa-
ther and Mother of Nicholas, with Isabel Daughter of the
Lord Mountjoy, in consideration of the said Marriage, and
8000 l. Portion, inter alia, settled the Manors of Great and
Little Harrowden to the use of Nicholas and Isabella for
their lives, the Remainder to the Earl of Salisbury, and
others, the Survivors of them for ninety nine Years, in
trust, to raise 6000 l. for Portions for the Daughters of the
said Marriage, the Remainder to the Heirs Males of the
said Nicholas by Isabel, with Remainder over, the Re-
mainder to the Lord Vaux in fee.

29 January, 1651. Nicholas and Isabel in consideration of
their Marriage formerly had, and a Portion of Money paid,
and natural affection, convey the said Manors to Russel,
and Rich and Lake, to the use of Nicholas for ninety nine
Years,

A trust for rais-
ing a Sum of
Money on a term
which happens
to be void, trans-
ferred by ano-
ther term,
whereon the
Grantor had
power to charge
it.

Pears, if he lived so long, the Remainder to Isabel for her life, the Remainder to Russel, Rich and Lake for the life of Nicholas to preserve the Contingent Remainders after limited, the Remainder to the first, second, &c. and other Sons of Nicholas by Isabel, and the Heirs Males of their Bodies, the Remainder to Russel, Rich and Lake for ninety nine Years, with Remainder over. The Trust of this Term, to the use of such Persons to whom the Sum of 6000 l. as the said Isabel according to a proviso should appoint.

The Proviso was, That if Nicholas or his Wives, or other Person, Owner (of the Reversion on the ninety nine Years) should pay such Sum, not exceeding 6000 l. as Isabel by her last Will in Writing should appoint, whether she was Covert or Sole, then the Lease to cease, and until such payment to the use of those Persons, &c.

Proviso, That Nicholas with consent of Isabel, Russel, Rich and Lake in writing express, may revoke all and every the said Uses, and limit new.

14 January 1652. The Lady according to that Proviso revokes all the Uses in the Deed, 20 January 1651, and declares that a Fine and Recovery was to be had to the use of Russel, Rich and Lake, and their Heirs, in Trust, That they execute a Deed prepared to be dated 28 February instant, for securing of 2000 l. to Sir Thomas Hewet of part, and to stand seized of the residue to the Uses in the Covenant of the 29 January 1651, and then to convey the Premises accordingly.

18 February 1652, Part of the Premises are demised by Russel, Rich and Lake to Sir Thomas Hewet for five hundred Years for securing the 2000 l. with power of Redemption on payment.

In this Conveyance Nicholas, Isabel, the Lord Vaux Father of Nicholas, and divers other persons join. And in this Indenture it is recited, that the said Nicholas according to power in a Deed 28 January 1651, he the said Nicholas by Indenture dated 24 February, with consent had revoked every the Uses in the Indenture, 20 January 1651, and declared the Use thereof to Russel, Rich and Lake, and their Heirs, to the intent to join in and execute the security therein mentioned, and afterwards to convey to the Uses in the tripartite Deed mentioned, that is, the Deed 29 January 1651, as by the said Indenture of Revocation appeareth.

13 January

13 January 1651. There are others other Recitals, & inter alia, a Lease of the said Mannors made 13 February 1651. to Engrim and others for years, determinable on the death of Nicholas Earl of Banbury. And it is agreed that till default of payment of the 2000 l. to Sir Thomas Hewet, the Profits of the same should be disposed according to the Trust in that Indenture (viz.) for the said Nicholas, &c.

Anno 1653. Nicholas, &c. conveys the said Mannors to the Uses mentioned supra, (viz.) to the use of Nicholas for life, the Remainder to Isabel for life, the Remainder to Russel, Rich and Lake for the life of Nicholas to preserve Contingent Remainders to first, second, third, &c. Sons of Nicholas, &c. ut supra, the Remainder to Russel, Rich and Lake for ninety nine years, then next, and that Russel, Rich and Lake during the said Term should employ the Rents and Profits of the Premises to the raising of such Sums of Money as Isabel by Will in Writing, or other Writing should appoint, and at such time, and in such manner, and to such Persons ut supra, and in default of payment at such times the Persons to whom, &c. to take and receive the Profits prout supra.

Proviso of Revocation in terminis prout supra.

The Lady Isabel by Will appoints payment of the 6000 l. to the Plaintiffs, and others, and the death. Nicholas on treaty of marriage to be had with the Countess and 4000 l. Portion, covenants to levy a Fine of the said Mannors to the use of Nicholas for life, the Remainder to the Defendant for her life for her Jointure, the Remainder over in Tail.

In this Assurance are the Incumbrances excepted of the ninety nine years, and 6000 l. Daughters Portions in the Deed 1649. and the Mortgage made to Sir Thomas Hewet for 2000 l.

The Bill is now to have the other Sum of 6000 l. limited by the Deed 1653. and appointment thereof by Isabel Harvey surviving Trustee of the first ninety nine years, and the Lessees by the Deed 1653. for ninety nine years, and the Lady Jointress are Parties.

The Cause was formerly heard, and a Decree pronounced by the Lord Chancellor for the Plaintiffs, and now confirmed by him with great earnestness, and not without some reflection on the Defendants Council, as if the Fee was more regarded than the Justice of the Cause.

The Points moved were, That the Trust to raise the 6000 l. in question was appointed to be raised out of an Estate for ninety nine years, which falls out to be a void Estate; for it is for the same Term when the former Estate for ninety nine years to the Earl of Salisbury did commence (viz.) after the death of Nicholas and Isabel, which now in event of the Cause (Nicholas having no Issue by Isabel) falls out to have the same beginning and ending with the former; but two Terms at one time cannot be in possession for the same time; and the Limitation is not that the said Mannors shall be to those Uses, but the Trust seems to be restrained to the Estate of ninety nine years limited by the Deed, and to those Persons (viz.) Russel, Rich and Lake, who should during the Term to them limited, raise, &c. And where there was no Estate, no Trust could be annexed, nor could there be Trustees of that Estate which had no being: It were to suppose *Accidens subsistere sine substantivo in quo existat*, and it were *Coloratum sine Colore*; and it could not be equitable to make the first ninety nine years liable to this 6000 l. for there is no such thing appointed by the first ninety nine years. And the Plaintiff here claims by a voluntary Conveyance without any Agreement or Contract precedent for the doing thereof; but the Defendants claim upon a valuable consideration of 4000 l. Marriage and Jointure: And tis a hard strain to translate a Trust charged particularly on an Estate of ninety nine years, which is a void Estate beyond the words express to another Estate; for though in truth Nicholas might have charged the first ninety nine years after the first 6000 l. charged thereon, yet he did not do it: And the mention that the Deeds 1651. and 1653. were for a Portion of Money paid, that is untrue, for no more was paid than what was paid and satisfied by the former Settlement 1649.

The Lord Chancellor decreed the contrary, That the Trust of the last 6000 l. should be charged on the first ninety nine years. For Nicholas intended the raising thereof, and had power to charge the first ninety nine years therewith after the other 6000 l. raised, and regarded only the Parties intent to raise the Money, though he pitched not on proper means.

But

But it was objected, that the Plaintiffs Title being voluntary, and the Defendants for valuable Considerations, the Plaintiffs Title prima facie is fraudulent against a Purchaser.

The Chancellor said, A voluntary Conveyance may be good and not fraudulent, and that from the Circumstances of persons of Honour who are Trustees, and concluded it not fraudulent.

And though he was press to direct a Tryal at Law on that Point, would not do it, for whether fraudulent or not, is proper for this Court.

The Defendant being a Purchaser had no Notice of the Trust on the last Lease of Estate for ninety nine years, and so not bound by it clearly, the nor her Friends having no actual notice : And the rather for that the Deed of 1651. was revoked, and so is recited to be. And there is indeed mention that an Estate was to be created to Russel, Rich and Lake, and their Heirs, but no mention that there was any new Estate for ninety nine years to be made to them, nor of the Trust to raise the 6000 l. herein mentioned.

But my Lord Chancellor declared, that there was sufficient notice in Law, or an implied notice ; for the Mortgage to Hewet was excepted in the Defendants Conveyance, and therefore they could not be ignorant of the Mortgage and ought to have seen that, and that would have led them to the other Deeds, in which, pursued from one to another, the whole Case must have been discovered to them.

A Recital of the Deed which does refer to the Incumbrance, is notice against a Purchaser.

But against this it was objected, that the Defendant could not enforce the Mortgagee to shew his assurances, nor would any Mortgagee so do ; and when there was only 2000 l. due, thereon, which the Joyntresses Friends were content to be charged with, there was no reason to enquire further, especially into things collateral to the Mortgagees Estate. Besides, notice to charge a Purchaser ought to be perfect and compleat, and there was no means for such notice ; for two things were to be notified, (viz.) a Power to charge the 6000 l. and Execution of that Power, of which there was no colour, nor no means to be informed. For Habels power was general to limit the 6000 l. to any person or persons at any time by Deed or Will ; so the Enquiry was uncertain and almost impossible to find out.

By Keck prest it much, that it was without Precedent, that a voluntary Conveyance should be decreed against a Purchaser for valuable consideration. Purchasers were ever favoured by the Court.

By Lord Chancellor was not moved with this Objection.

Philips against Philips.

A Debtor Executor to the Testator, decreed to pay to the Devisee of the Residue, &c.

Nicholas Philips the Testator made his Will, and made the Defendant Executor, and devised divers Legacies, and the residue of all his personal Estate to the Plaintiff. The Executor was Debtor to the Testator in 400 l. He left sufficient personal Estate to pay all his particular Legacies.

The Question was, Whether the 400 l. being discharged in Law to the Executor, should be accounted as part of the Residue, there being no need of it to pay Debts or Legacies particularly given; for the Testator must not be supposed ignorant, but knowing of the Law, that by making his Debtor Executor he thereby discharged the Debt, and so the 400 l. became no part of the personal Estate, and so no Residue thereof. And difference was pressed between Legatees and Debtor, in which the Debt though discharged should be Assets, and where it was between the Executor, who is in this Case in effect a Devisee of the Debt.

But the Lord Chancellor disallowed the difference, and decreed for the Plaintiff the Residue, &c. against the Executor. Though it was objected that this Case was different from former Presidents.

Gartside and Elizabeth his Wife, and Ann Ratcliff, an Infant, Plaintiffs, against Peter Ratcliff and others. November 6.

Deeds suppressed and the Lands decreed without Tryal.

The Case was, Ann the Mother of Elizabeth and Peter Ratcliff the Defendant, agreed that a Marriage should be between the Plaintiff Elizabeth and Peter, Son of the Defendant Peter Ratcliff. The Portion 500 l. And Lands

Lands of Peter and the Defendant were to be settled, part on Peter the Father for life, Remainder to Margaret his Wife, the Remainder of these Lands, and all other his Lands in possession to Peter the younger, and his Heirs, free from his Incumbrances. The Marriage was had and the Portion paid, and a Deed executed by Peter, purporting a Settlement to the said Uses. But Peter the Father by a Will and Trick set forth in the Bill and proved, got the same again into his hands, and burnt or cancelled it.

The Bill is for Relief that the Plaintiff Elizabeth, the Wife of Peter the younger, may be relieved for the Profits of one third of the Lands settled in possession in Fee to her Husband, and the Infant to have the other two Parts of the Inheritance of all according to the Marriage Agreement and Deed in pursuance thereof. Peter by Answer denied the Settlement, and Henry the Son did so also, and that he had no notice of the Agreement, and made Title to the Lands by a former Marriage Settlement on the Marriage of Peter the Father, to the Father of Peter for life, Remainder to the first, second, &c. Sons of Peter, in Tail, to the Heirs Males, &c. so as Peter, who made the Settlement by which the Plaintiffs claim, was but Tenant for life, Remainder to Peter the Son in Tail, Remainder to Henry the Defendant, second Son of that Marriage, and to Peter the first. And so Peter the first Son being dead without Issue Male, the Land remained to him. But a Recovery was produced by the Plaintiff, suffered by Peter the younger, that he objected against the Recovery, because the Father was Tenant for life, and survived not.

The Plaintiff had a Decree according to the Bill, and confirmed on Re-hearing of the Cause in Hill. 28 Car. 2. by the Lord Chancellor, because the Father suppress and got into his hands the Writing, which was done for his advantage, for he needed not have so done for Henry's advantage; and where Deeds are suppress omnia præsumuntur.

And the Chancellor would not allow a Tryal at Law whether the Father Surrendered to enable the Recovery or not.

Sir Francis Hill *against* Sir Robert Carr.
November 6.

In what Cases
Action of Co-
venant will lie.

Decree for Se-
curity of the
Mony which
depended on
Account, whe-
ther the Securi-
ty shall be given
before the Ac-
count stated.

2 Rel. Rep. 434.
2 Vent. 350. 1
1 Levinz 239.
Hob. 203. 1 Rel.
Abr. 379. Pl. 7.
Aut. 171. 172.
235. 236.

Covenant to
levy a Fine, and
a Decree that he
shall do so, binds
the Issue in Tail

SIR Robert Carr covenanted with Sir Francis to secure 6000 l. to Sir Francis in consideration of marrying his Sister. Much Debate was formerly whether it was a Covenant, and so obliging to Sir Robert, or no; and Judges assisting, there was a difference in Opinion in the Point, that it was a Covenant; for where-ever the Intent of the Parties could be collected out of a Deed for the not doing or doing a thing, a Covenant will lie: And the Chancellor declared his Opinion to be so. And a Covenant will lie on a Bond, for it proves an Agreement. And for further Security a Fine of certain Mannors to be levied by Sir Robert, and a Decree was pronounced accordingly. But on Re-hearing it was questioned whether the Decree should be for the Fine to be levied presently, or till the Account between Sir Robert and the Plaintiff settled; for Sir Francis had received some Mony. And it was pressed by Defendants Counsel, that till the Account past, the Duty was uncertain.

2dly. That Sir Robert by levying a Fine Tenant in Tail should subject his Estate to other Judgments and Statutes. It was answered, Security ought to precede Payment; and if he were subject to other Statutes they were his own Debts And his Act ought not to prejudice Sir Francis, who was intitled to have a Fine by Sir Robert his own Covenant, and there was no reason the Court should hazard the Plaintiffs Debt, lest Sir Robert should be made subject to other Debts.

But the Lord Chancellor declared, as he after decreed for the Reasons, ut supra, that the Fine should be respited till the Account settled.

It was objected, that Sir Robert being Tenant in Tail, if he should dye before the Account settled, the Issue in Tail will not be bound by the Decree.

But the Lord Chancellor answered, that the Covenant being to levy a Fine upon valuable consideration, and a Decree in pursuance thereof, the Decree will bind the Issue, seeing the Father of Sir Robert had power by Fine to bar the Issue.

And

And another Matter was, the Defendant was left to his Remedy at Law on the Land by way of Covenant, to recover such Damages only as he had sustained by not settling the Joynture on his Wife, though she was now dead.

And we objected, that this Bond was for the Wifes advantage in Trust for her.

The Lord Kennoule against the Earl of Bedford, and others, Trustees of James Earl of Carlisle, whose Heir at Law the Plaintiff was. December 19

THE Case was, The Earl by his last Will devised his Debts to be paid by his Lands in D. and if those sufficed not, by Sale of his Lands in S. and if those sufficed not, by Sale of his Park; and if that sufficed not, by Sale of his Lands in Waltham, and devised that the Plaintiff should have 600 l. per annum, during his life out of his Lands in Waltham. The Trustees sold D. and S. and a great part of his Lands in Waltham, and paid the Debts; but the Park was not sold; but the Lands in Waltham not sold are not sufficient to answer the Annuity which was 4000 l. Arrear. It was moved that since Waltham Lands were sold instead of his Park, that the Park might be sold to satisfy the Arrears, which was ordered accordingly, and the Money to be so applied. But there arose some Impediment in the sale by reason of some Title pretended to the Park by some who were no Parties to the Bill; and thereupon however the Possession of the Park was decreed to the Plaintiff against the Trustees, and all the Profits of Waltham Lands unsold.

Ventris 361.
Lands out of which an Annuity is issuing sold for payment of Debts, it was decreed to be paid out of other Lands unsold.

Freeman against Goodham. December 19.

THE Wife when sole, bought Goods for Money, and after married, and dyed. The Goods came to the Husbands hands after her death, but the Debt remained unpaid.

The Husband charged with Debts of the Wife for Goods of the Wife.

The Bill by the Plaintiff, the Creditor, was to discover the Goods, and a Demurrer thereto, which was over-ruled by the Lord Chancellor, who with some earnestness said he would change the Law in that Point.

DE

D E

Term. Sanct. Hill.

Anno Regis 28 & 29 Car. II.

I N

CANCELLARIA.

Pain against January 18.

The Husband
pleads: His Wife
will not swear
to it.

A Bill by the Plaintiff against the Husband and Wife, Daughter of the Plaintiff. The Husband put in a Plea in the name of him and his Wife, and swears to the Plea; but the Wife would not be sworn. The Husband moved that the Plea might be accepted, suggesting that the Wife did it by Combination with her Mother.

Ordered that the Plea stands as for the Husband, and the Plaintiff to proceed against the Wife.

Ford Lord Grey against the Lady Grey and others.
Et c contra.

The Father pur-
chafeth in the
Name of a Son
unadvanced, it
is an Advance-
ment, not a
Trust.

William Lord Grey had Issue Thomas his eldest Son and Ralph his second Son: William the Father for 13000 l. purchased the Manor of Gosfield in the Name of Thomas and his Heirs, and he enjoyed it, and took the Rents and bought other Lands adjoining in his own name, and added them to the Park, and inclosed them therewith, and owned all as his own sometimes; and Thomas declared several times, that the Manor was his Fathers, not his, or to that effect. But on the other side divers Speeches of his Fathers were proved, that it was his Sons, and the Son by his Will gave the Manor to his Father for Life; and divers Speeches also by the Son and Father that the Manor was Thomas his Manor, and the Father proved the said Will, being Executor. The

The Question was, Whether the Purchase was a Trust in Thomas for the Father, or an Advancement by the Father to the Son. And decreed an Advancement, not a Trust. And whereas the Father did after the death of Tho. convey Gosfield and three other Manors in Trust to raise 2000 l. for two other of his Grandchildren, Ralph and Charles, Gosfield was not liable thereto.

Another Question was: Ralph Father of Ralph and Charles, and of Ford, did make a Conveyance of Gosfield to Trustees and their Heirs, to pay his Debts and Legacies; and after for performance of his Will, and at the same time made his Will, and thereby did devise the Trustees to pay 2000 l. apiece to Ralph and Charles, and also 6000 l. to Katharine his Daughter, the Surplus after to his Heir Ford, and made his Wife one of the Defendants Executrix, ^{Personal Estate} but gave her not thereby in Terms the personal Estate, in aid of the but only made her Executrix; and devised that his said ^{Heirs.} three Children should release to his Executrix all such Actions and Demands of his personal Estate to his Executrix. Now the Question was, whether the Executrix should be liable to the Legacies of the Children in aid of the Heir, who had the Surplus of Gosfield that was to be sold?

As to the Creditors it was agreed, she must be liable; but as to the Childrens Legacies there ought to be no aid for the Heir; for when the Legatees were by the Will to release all demands out of, or to the personal Estate, they could make no demand out of it, which shews his intent, that therefore as to the Interest and Legacies the personal Estate was to be discharged, and the Executrix to enjoy the Estate free against them, and therefore the Heir not to charge the Executrix as for those Legacies of which he discharged his Executrix, especially having otherwise provided for their satisfaction. And the Surplus to the Heir is expressly after Debts and Legacies paid; therefore not before.

Against which it was said, that regularly the personal Estate must aid the Heir, and an implied intent must not without clear Expression alter the equitable general Law.

And there were other Reasons for the Release to be given (viz.) The Estate was in the Province of York, lyable to the Children for Portions.

The Lord Chancellor decreed the personal Estate to be accounted for in aid of the Heir in order to aid him for what he should be charged withal, not only as to the Creditors but as to the Legacies charged on Gosfield (viz.) the 6000 l. to the younger Children.

D q

DE

D E
Term. Sanct. Trin.

Anno Regis 29 Car. II.

I N
CANCELLARIA.

Boynton *against* Sir Robert Sprignal. July 3:

A Term conveyed on Trust to be void on purchasing and settling on Sir Sprignal for life, and after to his Wife for life, with Remainder over of an indefeasible Title, and not Tithes, &c. and this Trust was declared by Deed indented. After the Husband accepts of Lands in Buddington, part of the Lands of the Lord Craven, and desires the same in lieu and satisfaction of what was to be done.

The Lord Craven on Restoration of the King enters.

The Lord Chancellor decrees the Trustees to surrender the Lease to the Purchaser of the Lands which were aliened by Sir Robert Sprignal.

Note; A Trust by Deed interpreted to be satisfied by the Lands of a bad Title, tho the Deed of Trust be of an indefeasible Title, on proof of Discourse, and mention that the meaning was to settle Desinquent's Lands; and the same Covert bound by Agreement of the Husband.

Needler *again* Deeble. July 12.

Mortgagee sued the Mortgagor to pay, or be fore-
closed of Redemption. An Account was directed
and settled before a Master; and now a subsequent Mortga-
gee, whose Mortgage was made before the former Bill
was exhibited, sued the first Mortgagee and Mortgagor to
have a new Account, supposing the former Account to be
false, and made by consent and fraud; but did not insist on
any particulars, as in such case he ought.

The Lord Chancellor declared that the Account should
bind the second Mortgagee without farther Examination,
if the Fraud and Collusion were answered; for the first
Mortgagee did all he could, and is not bound to seek after
the second Mortgagee; so then it should be in the power
of the Mortgagor to make the Assurance uncertain and end-
less to the Mortgagee. It shall suffice to deny the Fraud
and Collusion.

The Mortgagee
bound by the
Account be-
tween the first
Mortgagee and
Mortgagor.

Notavelling in-
to an Account
stated, but by
charging of par-
ticulars.

DE
Term. Sanct. Mich.

Anno Regis 29 Car. II.

IN
CANCELLARIA.

Ayloff *against* Fanshaw. October 15.

Money brought
into Court im-
bezelled.

THE Remembrancer of the Exchequer takes Mo-
ny brought into his Office by Order of Court,
and spends it, and dieth; the succeeding Officer
(fearing to be charged with the Money (viz.) that
his Office would be sequestered (viz.) till the Money made
good by the Profits thereof) sues the Party who ought to
pay the Debt (viz.) the Defendant Fanshaw, who was
bound with the Lord Fanshaw to the Lady Kent, upon ac-
count of which Debt the Money was brought into Court,
and which Defendant was Executrix, &c. to the Party,
the late Remembrancer, who mis-employed the Money.
And a Demurrer to this Bill was disallowed, and the
Plaintiff might proceed in Chancery.

Barns *against* Canning and Piggot.

A Bill was exhibited to redeem a Mortgage against
Canning. Pendente lite Canning conveyeth his Lands
in question to Piggot, for Money. The Cause being brought
to hearing and a Decree for Canning, and enrolled;
Canning being to borrow Money of Barns, gave him a Con-
veyance of Lands, and assigned the benefit of that De-
cree, which were both (viz.) the Conveyance of the
Lands and the Assignment of the Decree defeazanced for
pay-

payment of the Money borrowed by Canning of Barns. Barns parted with the Money, till that as well the Assignment of the Decree as the Assignment of the Lands were made, the Lands without the benefit of the Decree being not of value sufficient for the Security. Barns offered in Court to resign to Piggot and Canning both Land and Decree on payment of Debt and Damage, and insisted that Piggot coming in pendente lite could not in Cannings Name nor his own, sue a Bill of Review. Barns Suit was to set aside a Release of the Decree which Canning had made for no consideration.

The Chancellor disliked the purchasing of Decrees, and said he was mad that would do it: Yet if the Plaintiff had it, he would not avoid it, but made the question to be, Whether that the Assignment of a Decree was not a Collateral and Supplementary Security, and not an Original Security, and so took it to be, and dismissed the Plaintiff.

He is mad that will purchase Decrees.
Assignment of a Decree a collateral supplementary Security.

Sir Robert Austins Case, who purchased and paid the same day that the Bill was exhibited by Culpeper, yet lost his Purchase, having no notice of his Suit.

Pit against Pidgeon. November 26.

Et c contra.

A Deviseeth that 300 l. be paid to his Child which he shall have at the time of his death; and if he have none, then to his Sister. Afterwards three Children are born to him; then by a Codicil he deviseeth 200 l. to each of these Children to be paid at their respective Ages of twenty one Years.

Devise of 300 l. to the Child he shall have at his death.
After he has three Children. Then makes a Codicil, and gives each 200 l. a-piece.

The Lord Chancellor decreed, tho the 300 l. be devised to the Child, &c. and now there be three, the Devise is not void for uncertainty, but all three Children share in it, and that the Devise of 200 l. being without words signifying the same to be of their Portions, nor any thing one way or another to revoke or affirm the former Gift of 300 l. it shall be taken by way of accumulation, and the Children shall have both Legacies.

Legacy and Accumulation.

Butcher

Butcher *against* Hinton and Short. December 5.
Short was not brought to Hearing.

THE Case. Butcher and Short Partners in Trade were indebted to Hinton a Banker, in a Bond of 12000 l. for payment of 6000 l. in October 1675. That Money being due, Hinton in December 1675, was called upon by his Creditors importunately for great Sums of Money. He requires Butcher and Short to pay him; whereupon they and Hinton agree, that for 2000 l. they will become jointly bound for so much to Hinton's Creditors, and for 4000 l. residue each to be severally bound to Hinton's Creditors (viz.) each for 2000 l. and not jointly; and Hinton gave a Receipt for 6000 l. under Hand and Seal to them, and agreed to deliver up the Bond of 12000 l. And being asked for it, excused the present delivery of it, because of the present hurry of business, but would do it. The Bonds to the Creditors were accordingly entered into. The Agreement prout proved by three Witnesses. The Bill was to have up the Bond of 12000 l. for Hinton in favour to Short endeavoured to charge Butcher.

Hinton in his Answer confesses the Agreement, but that it was qualified, and part of the Agreement was, that Hinton should be counter-secured by their Bonds against the Creditors to whom he was bound, and that he was dampnified for want of such Counter-security; for that he had been sued and forced to pay the Creditors 3000 l. and produced the Bonds whereon he paid the Money cancelled; but he had no Witness that proved expressly that part of the Agreement touching Counter-security, but proved four Bonds of Countersecurity sealed, &c. and left with the Scrivener, but not to be delivered till Matters agreed by Hinton and Butcher.

The Lord Chancellor. Take it for granted, that what Butcher did he agreed to do; or else he would not have done it.

A voluntary Agreement not obliging in Equity unless all be performed.

The Counsel for the Defendant insisted, that the Agreement being voluntary, unless all that should have been performed were performed, the Defendant should not be bound thereby in Equity, and his good Security taken from him.

Churchil. The Plaintiff fails in not paying nor giving Countersecurity.

E contra

E contra, It was said, that the Agreement was to give Bond, not to pay the Money; for the Bond once given binds to payment, and the failure of Short to give Security may not prejudice Butcher, who did: And the Caution to the Scrivener must be intended of the relate to, not the delivering up the 12000 l. Bond; for no Reason to countersecure and become doubly bound for the same Debt, but ought first to be discharged of the old Bond and Debt.

The Lord Chancellor. This Debate assures me that Short has failed, or else the Contention is vain; and the Agreement not being fully performed, I cannot take away Hinton's legal Security and pay him with Parchment; and Hinton had little avail by the Agreement, being bound in the new Bond.

Vanacres Case. December 20.

Allas indebted to B. Vanacre in 7000 l. and to C. and others in 300 l. and became Bankrupt. B. sued at Law, and had Judgment, and by Fieri fac. 23000 l. by Goods, but knew nothing of the Bankruptcy. C. sued out a Commission of Bankruptcy, and had those Goods that were taken in Execution assigned, and for some of them brings an Action of Trover against B. and hath Judgment and Execution for 50 l. or thereabouts. B. dyeth, and the Assignee of the Commissioners brought an Action of Trover against the Executor for the rest of the Goods, and recovers 500 l. and hath it, and then brought a Bill in Chancery for the rest of the Goods against the Executor, as in Case of an Executor, who commits a Devastavit, and dyeth; his Executor shall be charged here, tho he cannot be charged at Common Law.

On the first hearing an Order was drawn up, that the Petitioner and other Creditors should come to an Account proportionably have satisfaction out of the Estate not recovered. Whereupon the Case came now to be reheard and so ordered.

The Lord Chancellor. The Order is not well grounded. This is not like the Case of a Devastavit, wherein time the Common Law will be altered. I should not in this Case have decreed the Executors to account, but grounded myself on a Consent, and that was, that the whole Debts and whole Estate be on all hands accounted for, comprehending the Money recovered, and proportionably divided.

Then Costs was prayed to be, for that the Executors should pay Contribution Money; but decreed otherwise.

Note,

Creditors to come to an Account, and to have proportionable satisfaction out of the Estate not recovered.

Roll. Abr. 376.
R. pl. 3.
Mour 556. pl. 755.
Can.

Note, The Executor in Case of a Devastavit is in nature of a Trustee of an Estate. The Testator here is a Trespasser, to which the Executor is no way liable.

Willoughby *against* Perne. December 21.

THE Bill was to be relieved against a Statute of 26 Eliz. 94 years old, by the Heir, against a Lease of 60 years made by the Ancestor, for A. in Trust for 40 l. a year, to a Wife for a Joynture, the Heir claiming by another Statute sign to the Lease in Trust, so as the Lease could not hurt him.

Antiquity of a
Statute answered
by being
proved and Interest
paid.

The Wife to protect her self against the Statute pendente lite, after the Bill exhibited, procured an Assignment of the first Statute, and set it forth by Answer. Against which, Proof was made by the Plaintiff, that the Defendant, (viz.) the present Husband, who married her when a Widow, had after the Bill forged and falsified the Church Book, whereby it would appear that the Statute was not acknowledged by the Besail, as the Defendant pretended, and who after the Statute purchased the Land, but by the Besail of the same Name. And that William the Besail was an Infant, (viz.) of sixteen years, and so it was to be presumed, that after so long time, that his Father, and not he was Cognizor, and then the Land not being ever in the Besail, his Statute could never affect the Land; and the Equity of the Plaintiff was on the Antiquity of the Statute, because of the falsity of the Defendant.

The Plaintiffs Evidence of his defence at Law is suppressed, and the Defendant having sworn in his Answer he knew not of the Statute of 26 Eliz. till such time, that was also proved false. The Defendant proved the Lease and Joynture and Payment of Interest till 1644, and then Agreement to forbear Extent till 1658, and then a Wi-nority.

The Lord Chancellor. This Statute being proved, and Interest paid, the Antiquity is answered, and a Man shall not be arraigned out of his Estate; and it is not material what was given or paid; for if he paid nothing the Heir shall not profit himself by it. But a Proposal being made by the Defendant, time was given to the Plaintiff to accept it, or be dismissed.

D E

Term. Sanct. Hill.

Anno Regis 29 & 30 Car. II.

I N

CANCELLARIA.

Stock against Denew.

The Defendant libelled in the Admiralty Court of Dover against the Ship called the, &c. and suggested himself Owner, and that the Ship was unlawfully taken from him at Sea; and the Ship coming into Dover Road and arrested, one Parliuan came & pro interesse suo pleaded to the Process of the Admiralty; That during the War between England and Holland, a Dutchman (naming him) by virtue of a Commission from the States, took the Ship and sold it to him, and thereupon the Plaintiffs Stock and his Surety did give a Bond to pay the Condemnation Money. On final Judgment of that Court the Ship was there appraised, and Sentence for the Plaintiff, because the Defendant failed in proof; and the Defendant appealed to the Duke of York (Chief Admiral of Dover) and a Commission by the Duke to hear and sentence, &c. and therein the Appellant proved the Commission to the Dutchman and Captain, and had Sentence for her. But the Bond being put in suit at the Common Law, the Defendant pleaded the Sentence in the Appeal. But the question there was, Whether the Appeal was well brought, because it was not sufficiently set forth that the Duke had Jurisdiction of the Judges in Camera Scaccarii

R t

(102

No Appeal from
the Court of
Dover to the
High Admirall.

(for there it was depending by Writ of Error) directed learch to be made for Presidents of Appeal to the Duke as Admirall, but none could be found. The Defendant exhibited his Bill in Chancery, and finds there no relief, for he desired there to examine his Witnesses, and to have a Commission for that end. But in regard the Appeal was not brought in time, overruled not.

The Plaintiff petitioned the King on the whole matter, and prayed a Commission of Review of the Dover Sentence; and the Dutch Agent or Ambassador interposed therein; and it being Business of State, and relating to Articles made on the Peace, An Order was made by the King and Council, that the Parties should go to Trial, and the property be insisted on (viz.) in effect, whether the Ship was lawful Prize or no, in an Action of Trover. Stock thereupon moved in Chancery to stay Proceedings on the Judgment at Law till the Trial, which was granted, it being a matter of State, and of which the King and Council had taken notice. But Stock desired the Depositions of Witnesses taken in Chancery and Dover Court, and that the Commission from the Duke might be used at the Trial. By Order of Chancery those of Dover and in Chancery were yielded to; but opposition was made to the Depositions by the Dover Commission, because they were coram non Judice.

The Lord Chancellor denied the use of them for that reason. But the Plaintiff shall not therefore lose his Cause, if he can yet make proof, tho he mistook his way; and the Case concerns matter of State, and therefore he shall have a Commission to prove his Cause if he can. But the Plaintiff shall bring the Bond into the Court.

Condition of a
Bond to pay the
final Condem-
nation of the
Court of Dover
how relieved.

Note, It is admitted at Law and in Chancery, That tho the Condition of the Bond was to pay the final Condemnation of the Court of Dover, yet if the Appeal had been right, and the Sentence at Dover repealed, the Plaintiff should be eased of the Bond. The Infunction was continued till the Trial.

D E

Termino Paschæ

Anno Regis 30 Car. II.

I N

CANCELLARIA.

Anonymus. April 18.

A Commission of Bankruptcy was taken out against Thomas Forth the 17th of Nov. 1676. but prosecuted only by Mr. Rushworth; the other Creditors consenting that Execution of the Commission be forborn a month, but Rushworth did not consent nor knew thereof, but herself prosecuted, and she sued Mead, who had possesst the Estate by Assignment of the Bankrupt. And it was insisted at the Trial, that Forth, who was the Bankrupt, was not so: and after she had a Verdict, and the four months were out; three weeks after the petitions to be admitted into the distribution, and now would contribute to the Charges, the suspension of executing the Commission having been so ordered by the Chancellor; and now directed to be admitted into Contribution by my Lord Chancellor.

The Lady Turner against Bromfield.

The Plaintiff being to marry Aston, it was agreed between Sir William Aston and Mr. Ewer the Plaintiff's father, that 2000 l. Portion shall be paid, and 300 l. per annum settled for the Ladies Jointure. And the Lands in question, in order thereunto were leased to Steven Ewer and Nicholas Ewer, for 99 years if the Plaintiff lived so long, and Stephen and Nicolas redemised the Lands to

R r 2

Aston

Whether a trust
of a Term for
the Wife be dis-
posable by the
Husband.

Alston for a lesser Term, rendring 300 l. Rent per annum. The Portion was paid on the Marriage, and the Inheritance settled on the Husband; the Husband died, the Plaintiff married Sir Edward Turner, and he for valuable consideration sold all his Estate at Law and Equity which he had in his own or his Wifes Right, and those under whom the Defendants claim, and made a Jointure of other Lands of 300 l. to the Plaintiff, who exhibited her Bill for the 300 l. per annum, and she is Executrix to Nicholas Ewer surviving Trustee. The question was, Whether the sale by Sir Edward Turner, her second Husband, should bar having the Jointure, for there was no Agreement for that to bar her first.

But it was insisted on, That tho the first Husband might not alien, the second might; for it was no more than if a Wife were Cestui que Trust of a Term, the Husband might sell, which was said, he might, for tho a thing in Action was not vendible at Common Law, yet is every day otherwise in Equity.

The Husband
cannot sell the
Wifes Jointure
by a former
Husband.

The Lord Chancellor agreed, If a Husband make a Lease for years in Trust for the Wife voluntary, and he sells, this may bind the Wife, because of the Fraud. But where a Trust is created for a Wife, as here in this Case bona fide, the Husband can in no wise bind the Wife, unless where she is examined, as in a Fine, or in this Court, else no Man shall be able to provide for Wife or Children. And he had no regard or notice, or not, to the Purchaser, tho in the Cause, nor to the second Jointure. And decreed for the Plaintiff; and a former President in Point was shewn.

Because then there should be a perpetuity of a Term; and tho there be difference in words when Lands of Freehold are devised to one for life, the Remainder afterwards to his Heirs immediately, and when a Term is so devised, the difference is in words; and new Estates, Jointures and Settlements are of long Terms: And a similitude is between them, &c.

D E

Term. Sanct. Hill.

Anno Regis 30 & 31 Car. II.

I N

CANCELLARIA.

Civil against Rich. January 24 & 25.

THE Question was on a Will, whereby after other Requests this Clause was added, (viz.) *Item* All the rest of my Lands, Goods and personal Estate I give to A. B. on Trust, to give my Children and Grandchildren according to their Demerits. The Testator dyed: The Devisee, who was Heir and Executor, gives the Land to one omitting the rest. And the Question was, If that was a disposition according to the Trust, and was much argued.

The Lord Chancellor. I take it for a Rule, that where-
soever there is a demand in Law or Equity, there must be a
certainty of the thing demanded to be adjudged or decreed;
here it is left both for the time when the Demand shall be
made and to the Sum or proportion of the Lands, and
here is by that means an uncertainty of the Parties to
whom he may afterwards have more or less Grandchildren.
I sit not here to make the Wills of Men, nor to interpret
them farther than the Wills go; and therefore as to the
Settlement of the Lands on one and not on all I cannot
alter; It is clear the Children are not to come in by the
Will immediately, but by the Act of the Devisee; and he
is to give or distribute according to their Demerits; there-
fore he is Judge; and dismiss the Bill as to that.

De

Devises to his Wife to distribute among his Children during her Widowhood she in riles, and then distributes, of good.

He remembered several Cases in this Court, (viz.) one adjudged by himself, where the Husband of a second Wife having two Daughters by the first, devised his personal Estate to his Wife to be distributed among the Daughters during the Widowhood of his Wife, and dyed; she married again, and afterwards gave the whole to one of them, in that Case the other was relieved, because the power of distributing during her Widowhood did determine upon her second Marriage, and a Trust may be annexed to a Power or to an Estate with Power.

Devises to his Wife in hope she will leave it to his Son, no Trust.

He also remembered a Case between and in the Lord Egertons time, where one possessed of Leases for years devised them to his Wife, and hoped she would leave them his Son, and dyed. Her second Husband granted the Leases away; the Son sued to be relieved, but was dismissed; for it was no Trust for the Son.

And in the principal Case, he said, though they amounted not to give the Plaintiff the Lands, yet the words were not idle, but put a restraint on the Devisee; for though he might give the Lands as as he did, yet he could not give them in Possession or Remainder to any Stranger, but only to the Family.

Whether the Estate which a Citizen hath as Executor to another, be liable to the Custom.

Then another Question arose touching the Personal Estate, wherein the Point was, That a Citizen of London, being residuary Legatee, dying, whether this being but a Legacy, which till Election rested prima facie in the Legatee, not as Legatee, but as Executor, (for he was Executor) and the first Testators Estate, which remains in the Executor as Executor, shall not be subject to the Custom as the Executors own Estate.

The Lord Chancellor decreed the contrary, and said, I will make Election for him.

Clark against Danvers. January 28.

Samuel Wats Grandfather of the Plaintiff, took a Copyhold Estate in Reversion for three Lives: And the Copy was to Elizabeth Mother of the Plaintiff, and to J. S. and Danvers successively. Elizabeth was made the Purchaser (viz.) Et Eliz. dat pro fine 4 l. By the Custom of the Manor the first taker may bar the Remainder. Danvers the Defendant was Sonson to the said Samuel, Elizabeth the first taker, and J. S. dyed. Danvers is admitted; the Copy-

Coppyhold was decreed to the Plaintiff, Heir and Executor to Elizabeth; for my Lord Chancellor held, that though Samuel paid the Fine; yet when by his Consent Elizabeth was made Purchaser in the Coppy, it shall be taken as all one as if she had paid it. And if so, it shall be intended that all the Estates in Remainder were in Trust for her, and she hath Power, as by the Custom, so by the Trust, as Cestuy que Trust to dispose of them.

Sir Francis Winnington objected, That however the Plaintiff was not intitled; for as Heir or Executor he cannot be intitled to the Trust of a Freehold for Life.

The Lord Chancellor. Altho shall have it; &c.

Gold against Canham. January 28.

Gold, Lee and Canham were Partners in a Trade at Leghorn; upon Account they dissolve their Partnership, and Gold had his share satisfied him out of the Stock. Many years afterwards Gold had occasion to receive 500 Dollars at Leghorn, which was to be paid him for Merchandize by A. B. another Stranger, which no way related to the Partners Trade. The 500 Dollars were consigned by Bill drawn on Kirk by Canham payable to Gold, to be received for his use, and Gold received them. Canham sued at Law for the Dollars. Gold sues here to be relieved, and insists that he ought to detain the same, because when the Partnership was dissolved, Canham did covenant to save him harmless from all Losses and Damages due or which might be due, or brought on, or which might or should happen to him the said Gold in relation to his part; and that long after the dissolution of the Partnership he was sued by the Duke of Tuscany for Customs unpaid at Leghorn, for the Goods which belonged to the Joint Trade, which amounted to 60l. and Costs, which he had paid, and therefore insisted to retain to pay himself out of the Dollars.

Retainer of Money in his Hands for satisfaction of a Contract to save harmless-

Mr. Attorney Jones. The Partnership was long surrendered (I think he said fourteen years) in all which time we have nothing to do with Gold, and the 500 Dollars is paid only to our use, and no relation to the Partnership. And the Covenant to save harmless is no Debt, but only rests in Damages. And to the Sentence in Law we are no Party, nor ever acquainted with it. And by what Evidence or

fact

faint defence made by Gold the Sentence was given, we know not. And it is more probable when Gold had his Money in our Hands he on design to pay himself out of our Money in his Hands made faint or no defence. And its improbable that the Dukes Officers should be so long negligent of the Dues to the Duke, and the Plaintiff should have given notice to the Defendant.

The Lord Chancellor. Whether the Bill of Exchange was before or after the Sentence doth not appear.

Mr. Attorney objected. This is like a foreign Attachment to pay due on one Account, or occasion out of another; and the Money is not due from Canham only, but also from Lee, till at last it was answered, that Canhams Covenant extends to all which Golds part suffered.

And decreed accordingly.

THE TABLE.

A.

Abatement.

Proceedings after Abatement of Suit decreed and enrolled, no Error or cause of Reversal, 122

Account.

An Account rested upon 14 years is conclusive, 127

Where an Accountant having lost his Papers by no default of his own, shall not be charged beyond his Oath, 128

Creditor of a delinquent having his Debt allowed him in the Purchase of the delinquents Estate shall not be put to account for the Profits under the Purchase in discharge of the Debt, 173

Plea of Account stated overruled, though the Defendant but an Executor, and the Account stated by the Testator, 262

Decree for the Security of the Money which depended on Account, whether the Security shall be given before the Account stated, 294

No travelling into an Account stated, but by charging of particulars 299

Creditors to come into account, 303

Actions.

Suits *quia timet* proper in Law and Equity, 213

Administration.

Issue directed whether a person to whom another got Administration was dead or not, and Injunction to stay Execution, 30

A Term aliened by an Administrator shall go to his Executor, and not to the Administrator *de bonis non*, 224

A Devise to two Executors of *resid. bonorum*, one of them dies, the Administrator sues the surviving Executor for an Account, 238

Advowson.

A Difference between an Advowson *in Esse*, and the Patronage of an Hospital newly erected, 214

Agreement.

Marriage determines an Agreement made by the Husband with the Wife herself before Marriage, 21

Agreement, though the consideration be unequal, and in the nature of a wager, decreed, 42

Where an Agreement tho' conceived upon a mistake, shall bind the party, as when he conceives he had not Title (when in truth he

S f

had)

The TABLE.

had) to permit another to enjoy
Lands, 85
Whether when a lesser Sum is agreed
to be accepted at a precise day in
licu of a greater, if he that is to
pay fails in payment at those
days, he shall not have any benefit
by that Agreement, 110
Agreement of Baron and Feme be-
fore Marriage extinguished by
Marriage, 117
Agreement of parties cannot pre-
vent a Court of Equity in its Ju-
risdiction, 141
Tenant in Tail bound by his Agree-
ment to convey, 171. But the
Issue in Tail is not bound by that
Agreement, *ibid.* But if the Is-
sue accept of the Agreement and
enters on the Land it shall bind
him, 172
An Agreement for the Purchase
with the *Cestuy que Trust* of the
Surplus, not good unless the Tru-
stees are parties, 175
The breach of an Agreement is not
devisable, 208
The remedy of an Agreement ought
to be reciprocal, 209
A Bond determines a parol Agree-
ment, 226
Intail in Equity, not in Law, whe-
ther the Issue shall be bound by
the Agreement of his Father
without a Fine, 234
Where Contract is intire and ine-
quitable Equity will not appor-
tion Relief for part, as Security
got when the Defendant was
drunk, 262
A voluntary Agreement not ob-
liging in Equity unless all be per-
formed, 302

Alimony.

A Decree for Alimony *quousque* Co-
habitation, the Husband exhi-
bits a Bill, and offers to co-habit,
250
Decree to pay Alimony till Co-ha-
bitation, and now the Husband
offers to co-habit, the Court can-
not in this Case discharge Arrears,
251
No Alimony can be decreed but by
consent, unless there be first a
Decree for Separation, *ibid.*

Annuity.

Relief for an Annuity against a Pur-
chaser, 273
Lands out of which Annuity is is-
suing sold for payment of Debts,
it was decreed to be paid out of
other Lands unsold, 295

Answer.

Liberty given to a Defendant to
amend her Answer, she being sur-
prized therein, 29
When the first Answer is reported
insufficient, the Defendant if he
answer again without excepting
to the first Report is to answer all
the points excepted, though the
same exceed the Bill, 60
Where the Plaintiff's own Answer
shall not be suffered to be read
against him, 154
Rule, if a second Answer be insuf-
ficient, Process shall go on where
it was before, 238
Former Bill depending, yet answer
the second Bill, 241
Relief of a Debt which the Plaintiff
had sworn was satisfied before,
154
A

The TABLE

A Plea and three insufficient Answers whether to be examined on Interrogatories, 279

Appeal. Admiral.

No Appeal from the Court of *Dover* to the High Admiral, 306

Apprentice.

The Master ordered in a short time to sue his Apprentices Indentures or else to deliver them up, 70

Articles, Vide Agreement.

Whether Articles of Peace between two Crowns can discharge a Subjects Debt, 123, 173

What a man cannot transfer he cannot oblige by Articles, 210

Assets.

Trust Lands no Assets in Equity although the Trust be decreed in Equity, 14, 128

Whether Equity of Redemption in the Heir of the Mortgagor be Assets in Equity, 148

Bill to discover Assets, and doth not charge any Goods come to his hands, 226

Leases are Assets to pay Debts notwithstanding the Assent of Executor to the devise of them, 257

Assent.

Subsequent Assent will not supply the want of Consent precedent, 141

Assignment.

Things in Action assignable in Equity and how, 169

Difference between an Assignment of a *Cause* in Action by the Party, and by an Administrator a Stranger, and who had no colour of Right, but by the Administration, 170

Assurance.

Two Deeds of the same date touching one thing is but one Assurance, 7

Diversity between Covenants for farther Assurance and collateral Security, 252

Attachment.

Attachment against a Party revoking a Submission to an Award by Order by Consent, 185

Award, Vide Attachment.

An Award confirmed in part and made void in part, 40

Award set aside because the party did not actually assent to the Reference tho' he had attended the Reference in the Business, 87

Award erroneous because it was but of part of the Matter referred, *ibid.*

Submission to an Award by Consent of parties by Order of this Court is revokable, 185

Equity will not decree an Award unless it be of all Matters referred, 186

Whether Exceptions are to be admitted to an Award on a Reference by Consent, *ibid.*

No Relief against an Award made without Order of Court unless for Corruption, 279. Or exceeding Authority or the like; for

The T A B L E.

for there the Parties choose their own Judges; but if by Consent and Order of Court it shall be set aside, if unequitable, 279
 An Award that he shall procure the Infant, when at Age, to convey, set aside because unreasonable, 280
 The Court will decree no Award to bind the Infant, *ibid*

B.

Bankrupts.

MOST of the Creditors sign an Agreement, some of the Creditors sued out a Commission of Bankruptcy, and the others had notice, and seven months were past from the date of the Commission before the Commissioners assigned; those Persons concerned in the first Agreement, and excluded the Commission, seek to have the Agreement performed, or to be let into a Divident, but the Bill was dismissed, 19
 Commissioners of Bankrupts cannot assign a Covenant to renew a Lease. *Q.* if they can assign an Equity of Redemption, 71
 Difference between Commissioners of Sowers and Commissioners of Bankrupts, 232
 Proof of a Creditors Debt disallowed by Commissioners, the Court will hear the proof, 275
 Distribution after four months, 307
 Baron and Feme.
 Marriage determines and extinguisheth an Agreement made by the

Baron with the Feme before Marriage, 21
 The benefit of a Decree by Baron and Feme belongs to the Feme and not to the Executor of the Husband, 27
 The Wife sues for separate Maintenance without her Husband, 35
 Of things merely in action belonging to the Wife, as a Bond, Legacy, &c. she ought to join in Suit, *aliter* of a Rent running in the Wifes Right after Marriage, 41
 The Husband alone sues the Bond and dies before Judgment or Decree, the Wife cannot revive the Suit, *ibid*.
 A Trust for raising Money for a Feme Sole if she marry with the consent of the Trustees, and if not, then to such Persons as the Trustees shall nominate, and for want of such Nomination, then to themselves, shall enure to the Administrator of the Feme Sole, 58
 Whether the second Husband be answerable for Profits of Lands wrongfully taken by the Wife *dum sola*, and after by the former Husband during the Coverture, 81
 The Wife may not be suffered, tho' to good Uses, to dispose of any Money she hath raised out of her Husband's Estate by Frugality, 117
 A disposition by Feme Covert of Monies raised out of separate Maintenance, good against the Husband, 118
 Where the Portion of Money shall go

The TABLE.

- go to the Executors of the Husband, and not to the Wife surviving, 189
- A Trust for the benefit of the Wife without negative words does not exclude the Baron, 194
- The Husband cannot grant or charge the Term of his Wife in Trust, 225. Nor forfeit it for Outlawry or Felony, *ibid.* Alter of an Assignment after Marriage by the Baron in Trust for the Wife, for this is voluntary and fraudulent against Purchasers, *ibid.*
- When a Term is settled for Maintenance and Jointure of the Wife, the Husband shall never bind the Wife by his Alienation, 266
- The Husband charged with Debts of the Wife for Goods bought by her when Sole, 295
- Baron puts in a Plea in the Name of him and his Wife, and swears to the Plea, the Wife refused to be sworn, the Plea stood as to the Baron, 296
- Whether the Trust of a Term for the Wife be disposible by the Husband, 307
- The Husband cannot sell the Wifes Joynture by a former Husband, 308
- Bill.
- Certiorari* Bill, 31
- Certiorari* Bill to remove a Cause out of the Mayors Court, and because his Witnesses were out of the Jurisdiction, and the Bill was for an Account touching other Matters brought to hearing in *Chancery*, and not removed by *Procedendo*, because it concerned other Matters, and after hearing the Cause was dismissed out of this Court, 31
- Part of the Matter being omitted in drawing up the Decree, a Bill of Review lyeth to reverse those Matters, 37
- Notice given to a Stranger of a Bill of Review is Necessary, and it is improper to make him a Party not being in Privy, 152
- Devisee cannot bring a Bill of Review not being in representation to the Devisor, but in the Nature of a Purchaser, 174
- Money decreed by Rule of Court to be paid before a Bill of Review brought, but upon giving Security to pay it, the Rule dispensed with, 42
- Nothing shall be a ground to direct a new Tryal after Judgment that is not a ground for a Bill of Review to reverse a Decree, and a Confession subsequent to a Decree is no ground for a Bill of Review, 43. Nor is the want of any Evidence or Matter which might have been used in the first Cause, and of which the Party had then knowledge, and ground for a Bill of Review, *ibid.*
- Devisee cannot maintain a Bill of Review because he is not privy, 123
- After a Decree the Plaintiff may not dismiss his Bill, 40
- A Bill dismissed by Sentence against the Plaintiff given in the Court of *Denmark*, 237
- A Bill in another Cause no Evidence against the Plaintiff in it unless it be proved to be exhibited with his privy, 65

The TABLE.

A Bill after a Verdict in Action on the Case suggesting Matter (as a Letter) in the Defendants Cognizance, which the Plaintiff could not prove at the Tryal, the Plea was to the Verdict, that the effect of the Letter was given in Evidence at the Tryal, and the Demurrer was for want of Equity; Plea and Demurrer allowed, 65

A Bill taken *pro confesso*, 108

An original Bill to execute a Decree of Lands against a Purchaser, who claimed under Parties bound by that Decree was allowed good upon Demurrer, 231

Relief upon the Statute of Uses by Original Bill, 267

Vid. tit. Charitable Uses.

Two Executors are made (and one is conditionally) and they are Parties to the Bill, the Condition is broken, the other must bring a Bill of Reviver, 77

Statute lost, not to be helpt by Motion, but by Bill against all Parties, 270

Bond.

Money payable by Condition of a Bond moderated in respect of the Office out of which it was to issue, taken away, 72

Obligee in a Bond lost hath remedy against the Surety in Equity, 77

Obligee in a voluntary Bond or Grantee in a voluntary Deed lost hath remedy in Equity, 78

Money was paid to one (a Scrivener) who did usually receive Money for the Obligee, yet the Obligee not trusting the Receiver with the Bond, it was held no good

payment, 94

Where Interest is due on a Bond and the Debtor pay any Sum less than the Interest, the payment is to be accounted Interest only, 106
Interest upon a Debt due by Specialty and Costs at Law may upon circumstances be taken away in Equity, *ibid.*

No Relief in Equity against a Bond not to disparage another Mans Trade, 184

No Relief to be given against a penal Bond where there is no measure to ascertain the damages for the Breach, *ibid.*

An Agreement contained in the Condition of a Bond shall not be turned into a collateral Execution by Decree of Lands, 189

Assignment of a Bond in *Holland* according to their Custom, allowed here, 232

A Bond to pay on Agreement, and the Obligee agreed to save harmless, &c. he is relieved against the Bond without payment, 239

C.

Chancery. Equity.

THE Power of the Chancery as to Sequestration, 92

The Chancery assistant to the Jurisdiction of the Mayors Court, 203

When the Chancery (according to Rule) cannot relieve in a just Cause, the Parliament will give special direction for Relief, 205
Matters formerly examined in the Exchequer may be re-examined in Chancery, 156

Whether

The TABLE.

- Whether the *Chancery* can grant Relief upon the Statute of Charitable Uses by a Bill, 153
- When the intention is clear, all means without which that cannot be attained must be supplied by a Court of Justice, 177
- Whether a Sentence in the Spiritual Court be subject to Examination in Equity, 201
- Equity consists purely in Action, and is only attainable by Process in a Court of Equity, 208
- The Court of *Chancery* cannot by Decree bind the Isle of Man, 221
- The *Chancery* cannot help in Equity against an Act of Parliament.
- Where Equity creates the Estate it shall be guided by Conscience, 236
- Court of Equity a proper Interpreter of a Statute, 36
- He that will have Equity to help where the Law cannot, shall do Equity to the same person against whom he seeks to be relieved in Equity, 97
- Equity regards the Substance and not the Ceremony, 284, 285
- Aequitas sequitur Legem*, 284, 285
- Money brought in Court imbezilled, 300
- Circuity of Action, 211
- Charity and Charitable Uses, Vide Devise, Vide Will and Tit. Chancery.**
- Relief given by Bill on the Statute of Charitable Uses, 135, 150, 267
- Money given to a Parish generally without saying to what use, decreed to the Poor of the Parish, 135
- A Decree by Commissioners for Charitable Uses confirmed by Original Bill, 193
- The Course of Proceedings in the Petty Bag on a Decree of Charitable Uses, *ibid.*
- An appointment to a Charity that was precedent to the Statute of 44 *Eliz.* and so void, is made good, 195
- Tertnants Lessees of a Charity ordered to augment the Rent, *ibid.*
- Claims.**
- Entry on the Land by a *Cestuy que Trust* is not sufficient Claim, 269
- Commission.**
- When the party hath a Commission present he can never examine new Interrogatories by Commission as to the Merits, 274
- Commissioners adjourn, 282
- Common.**
- Agreement to inclose Common, parties that have Interest in the Common and not privy shall not be bound, 48
- Condition.**
- Breach of a Condition precedent relieved in Equity as in the nature of a penalty, 90
- A Condition may not be performed in all Circumstances, and yet be relieved in Equity, 141
- The breach of a Condition annexed to a voluntary disposition not relievable in Equity, *ibid.*
- The Condition of a Recognizance qualified in Equity according to the Equity of the Matter before the Recognizance given, 191
- Condition

The TABLE.

Condition of a Recognizance for payment of Money generally qualified in Equity to the original Equity, 191

Consent.

Consent binds the Party, but shall bind others, 210

Consideration.

Consideration valuable, but not equitable, as 5 s. is in Money, 34
Equity only remediable to those who come in upon a Consideration, 49

Loss as good a Consideration as Profit, 78

Marriage is good Consideration to make a Feme a Purchaser, 99

Contempt.

Contempt discharged by a general Pardon, 238

Contract. Vide Agreement.

Contribution.

Three bound in a Recognizance, one is sued and paid the whole, another is insolvent, the third is sued for Contribution, he shall contribute a Moiety and not a third part, 246

Copyhold.

Forfeiture of a Copyhold by selling of Timber relieved in Equity, 96

The Widow of the Lord decreed to be endowed of the third part of the improved values of the Copyhold, but reversed by the Lord Keeper as to that, 247

Act of the Copyholder not to hinder the Lords Wife of Dower, 247

Copyholder having for Money agreed to mortgage Lands stands trusted for the Mortgagees, 171

A Surrender void for want of a Presentment, made good against a voluntary Disposition, *ibid.*

Lord of a Manor cannot declare a Trust of a Copyhold granted to his Son, 261

Corporation.

A Course to recover a Debt against a Corporation, yet hath nothing whereby it may be summoned, 204

Covenant.

A Power to Lease raised by a Covenant to stand seised is not good, 161

If *Cestuy que Trust* covenant, that his Trustees shall convey, and he hath no means to force them to make such Conveyance, Equity ought not decree him to convey, but to leave the Covenantee to his Covenant, 211

The Land bound by Covenant, 260
Exceptions in Leases for three Lives, in one of these there is a Covenant to renew paying 20 l. it is notice implied, for they ought to see the Covenants, 260

A bad Title sold with Covenant for further Assurance, and afterwards the Vendor purchaseth the good Title, decreed to confirm, 274

In what Cases Action of Covenant will lie, 294

Retainer

The TABLE.

Retainer of Money in his hands for satisfaction of a Covenant to save harmless, 311

Counsellor.

A Counsellor is engaged to silence, he shall not be put to answer, 277

Custom.

The Factor shall have the benefit of Customs saved, and not the Employer, 27

The Tinner Articles to deliver Tin to the Merchant Custom free, and the Merchant sues to be relieved, but is not, for it is in *frandem Regis*, 256

D.

Decree.

A Decree avoided by Original Bill because claiming by Title paramount, 3

A Bill to inforce to do an act which the Plaintiff was formerly decreed to procure, *ibid.*

No original Bill ought to be admitted to explain a Decree upon any Matter of Fact precedent to the Decree, 45

Matters assigned for Errors in a Decree must appear in the Decree it self, for being of Record must be tried by it, 54

If Matter of Fact be mistaken at the Hearing and decreral Order, that must be rectified by re-hearing, and not otherwise, *ibid.*

A Decree in nature of a Mortgage, 63

When a Decree is to foreclose, the

Money not being paid, the Court in Cases of inevitable necessity will enlarge the time though the Decree be signed and inrolled, 64

A Decree avoided by original Bill upon Matter subsequent to the Decree, *ibid.*

A Decree impossible, 87

A Decree repugnant, *ibid.*

A Stranger being bound by a Decree gotten by Fraud may falsifie it, 152

All that come in *pendente lite* are bound by a Decree, *ibid.*

When a Decree is temporary or for special ends, an original Bill lies to put a period to it, 251

A Covenant to secure a Purchaser by other Lands not decreed, 252

Absolute Conveyances guided by Decree that directed them, 251

Tryal referred to Law, and ordered that the Defendant do not insist on a Title set aside by the Decree, 267

Where a Parish is sued, four moved to defend, and a Decree against them, one who claimed under none of the four, may have a Decree; and though no party nor privy, may have a Bill of Review, 272

He is imprudent that will purchase Decrees, 301

Assignment of a Decree a collateral or supplemental Security, *ibid.*

Deed.

In a Bill to discover a Deed the Plaintiff ought to make Oath that he had not the Deed, 11.

But with this difference, when the Bill alledgeth the want of a

The TABLE.

Deed, and seeks to be relieved on the Matter of that Deed, by a Decree, such Oath is necessary: But where the Bill seeks no Decree but barely to have the Defendant discover whether he hath such Deed or not, or to have the Deed produced at a Tryal, there the Plaintiff ought to be put to his Oath, 11
 Equity raised out of a Deed that was not proved, 48
 A Deed suppressed, and the Land decreed *sans* Tryal, 292
 A Purchaser from A. of Land, which B. makes Title to, getting the Deeds which makes B's Title is not bound to discover them, 69

Depositions.

Depositions in a former Cause between other Parties read against one that claims not under any of those Parties, 73
 Where Depositions in a Cause dismissed shall be used or not, 175
 Depositions read in both cross Causes, 236

Dismissal, Vide Bill.

Dismissal of a Cause without prejudice in Law or Equity how to be understood, 156

Demurrer.

Whether Demurrer may be to an Answer, 56
 Demurrer, because more was prayed to be relieved than can be, (*viz.*) to revive an Order to consent where the Feme was party and since married, and so her Consent determined, 77

Devise, Vide Will, Executor, Legacy.

Debts on a Bond and simple Contract to be paid in equal proportion where Lands are to be sold for payment of Debts; so of Debts and Legacies, because the Land is made liable to the one as well as to the other, 32. *Aliter* in a Case of Debt and Judgment that in their own nature charge the Land, 32, 249
 Difference between a Condition to make a Devise void without limiting it over, and the limiting it over to another; in the first Case the Condition is *in terrorem* only, otherwise in the later, and the Condition broken not relievable in Equity, 140
 No collateral Averment to be received to expound a Devise of Land, 143
 A Devise to an Heir on Condition, void in Law, yet good in Equity, 177. As on Condition that he sell, is void in Law; but it is good by way of Trust in Equity, 177, 179
 Whether the Heir shall be forced to sell Lands devised to be sold after the death of the Executor, when no party is named to sell, 180
 A difference between a Devise of Money out of Profits of Lands, and of Money raised by Sale of Lands, the first being a Charge only upon the Land in the Heirs hands, and so it favours more of a Trust than the other, *ibid.*
 A Devise of all Estate real and personal for payment of Debts, is a Devise

The TABLE.

- | | |
|--|--|
| <p>Devise in Fee, 197</p> <p>A Devise of all Estate real and personal for payment of Debts, there is no implied Trust of Surplus for the Heir, <i>ibid.</i></p> <p>The breach of an Agreement is not devisable, 208</p> <p>The consent of the Heir makes good a void Devise, <i>ibid.</i></p> <p>A Devise to two Legatees equally, the Devise is joynr, and yet intention prevents the Survivorship, 239</p> <p>Lands devised for payment of Legacies made subject to Debts, 248</p> <p>Debts and Legacies are to be paid equally where Lands are devised for the payment of both, unless it were such Debts as obliged the Lands, 247</p> <p>Where there is a Devise over of the Portion, the Court can allow no Maintenance out of it; <i>aliter</i> if no Devise over, 252</p> <p>Portions devised out of Lands payable at prefixt days, which the Premises will not do, amounts to a Devise to sell, 129</p> <p>A Devise void by misnomer of a Corporation, supplied in Equity as a good appointment of a charitable use, 267</p> <p>Debts to be paid before Legacies where Lands are devised, 275</p> <p>Lands devised for the payment of Debts and Legacies, the personal Estate shall be first applyed, 297</p> <p>A Devise of 300<i>l.</i> to the Child he shall have at his death, after he hath three Children, then he makes a Codicil and gives each 200<i>l.</i> apiece, its to be taken by</p> | <p>way of accumulation, 301</p> <p><i>All the rest of my Estate I give to A. B. to give to my Children and Grandchildren according to their Demerits; A. B. is Judge and may give all to one,</i> 308</p> <p>A Devise to his Wife to distribute among his Children during her Widowhood, she marries and then distributes, its not good, 310</p> <p>A Devise to his Wife in hopes she will leave it to his Son, no Trust, <i>ibid.</i></p> <p style="text-align: center;">Dower.</p> <p>The acceptance of collateral satisfaction for Dower is no Bar of Dower, 182</p> <p style="text-align: center;">E.</p> <p style="text-align: center;">Equity, Vide Chancery.</p> <p style="text-align: center;">Executor.</p> <p>A Widow paying just Debts of the Husband out of his Estate in her hands shall have Allowance for the same from the Executor, 33</p> <p>Land devised to be sold by the Executor, who dies, the Bill is preferred against the Heir for younger Childrens Portions, the Heir demurs, because it is but an Authority in the Executor, which dies with him, the Demurrer overruled, 35</p> <p>Where the Heir being forced to pay the Debt of his Ancestor on Bond shall be reimbursed by the Executor as far as there is personal Assets, 74</p> <p style="text-align: right;">Where</p> |
|--|--|

The T A L B E.

Where the delivery up of a Bond by the Executor, and taking a new Bond to himself for the Debt is no conversion in Equity to charge the Executor with the payment of that Money though it is at Law, 74. And the Executor decreed to assign the Security to the Heir, *ibid.*

Injunction to Debtors to a Testators Estate not to pay any Money to a pretended Executor till his Title to the Executorship were settled in the Spiritual Court, 75

Two Executors are made (and one is conditionally) and they are Parties to the Bill, the Condition is broken, the other must bring a Bill of Review, 77

The overplus of the Profits of a Term devised out of an Inheritance in Trust to pay Debts to Executors, who is also residuary Legatee, belongs to the Executor and not to the Heir, it being a Term, and passeth as an Interest, 98

Executor decreed to give security for a Legacy, 121

Executor decreed to pay Arrears of Rent which the Testators Estate was not liable to, *ibid.*

Executor not bound to pay a Legacy without security to refund, 137. if there be no want of Assets either of Debts or Legacies. *ibid.*

When Lands are appointed to be sold, and no Person appointed to sell, the Executor shall sell, 178

The Executor of an Executor is bound to sell the Lands devised to be sold, if the Executor fails to sell, 180

Where a Lease renewed by an Executor shall be liable to a Legacy of the Testators, 191

Executor of an Executor liable to a *Devastavit* made by the first Executor, 257

Executor Temporary proves the Will, and his Executorship ceased, the after Executor might sue without other Probate of the Will by him, 265

Legatee of a Term sues, and the Executor no Party, not good, tho' its charged that the Executor hath assented, 277

Debtor Executor to the Testator, decreed to pay to the Devisee of the residue, 292

Whether the Estate which a Citizen hath as Executor to another, and residuary Legatee, be liable to the Custom, 310

Exhibits.

Alteration of exhibits after Commissions, 273

Execution.

The Conussee of a Judgment having the Conusor in Execution may bring a Bill whilst he lives, to charge the Lands, 37

Examination.

Examination after Publication and after Hearing, 228

Exposition.

General words cannot be applied to particulars, or general words not particularly applied ought not to shake a Decree, 218

Error.

The TABLE.

Error.

Matters assigned for Error in a Decree must appear in the Decree itself, for being part of a Record must be tried by it, 34

F.

Factor.

THE Factor shall have the benefit of Customs saved and not the Employer, 27, 30, 37
The surviving Factor is answerable for himself and Co-Factor, 127
The executor of the Co-Factor first dying is accomptable, *ibid.*

Feme. Vide Baron and Feme.

The Feme tho' not bound by Agreement during Coverture, yet acting according to the Agreement when a Widow, bound by it, 255
Trust of a Term for a Feme Covert, 166. Vide Baron and Feme.
Feme Covert bound by the Agreement of her Husband, 298

Fine.

Fine pursuant to a Decree shall work only according to the Decree, 49
Fine and Recovery shall work on a Trust as an Estate at Law, *ibid.*
A Fine by Tenant in Common passeth but his own Estate, 211
By a Fine of *Cestui que Trust* in Tail the Intail may be barred, 213
Claim of an Equity to avoid a Fine can be no other way but by *Sub-paena*, 278

Covenant to levy a Fine, and a Decree that he shall do so, binds the Issue in Tail, 294

Fine and Non-claim bars a Trust, 268, and entry on the Land by a *Cestui que Trust* is no sufficient Claim, *ibid.*

Fine and Non-claim bars Equity and Trusts, i.e. where the Lands only are charged; but where the Lands are charged in respect of the Persons it bars not, 278

That Fine can never bar the Equity or Trust which it creates, *ibid.*

Fraud.

Every voluntary Conveyance is not fraudulent, but *prima facie* it is presumed to be fraudulent, 100

Its rare that Chancery takes upon them to judge a Deed fraudulent, *ibid.*

A voluntary Settlement precedent to a Marriage Agreement subsequent, is fraudulent, *ibid.*

Trial of a Deed whether fraudulent, 216, 217

A Conveyance cannot be fraudulent against Articles without another Conveyance be executed in a legal course, 217

Deed fraudulent as to one, good as to another, 244

Difference between a Covenant to settle Lands, and a fraudulent Conveyance, 245

A young Gentleman takes up Wares, &c. relieved, 276

Voluntary Conveyance may be good and not fraudulent, 289

The TABLE.

G

Grant.

M After of an Hospital, Prebendary, Donative not grantable in Reversion, 215
 Diversity between the Grant of a Master of an Hospital and a Patent for Land, 211
 Grant to the Warden and Assistants for benefit of the Inhabitants, they cannot let without the Inhabitants, 269

H

Heir.

H Heir at Law to be preferred in a doubtful Case, 7
 Heir at Law by Marriage Agreement became a Purchaser in Law, and not liable to pay Debts of his Ancestor, 255
 Heir shall join in a Sale for payment of Debts, 261
 Master of an Hospital, *Vide* Grant

I

Infant.

I Nfants Estate in the Guardians Hands ought to be applied to the Payment of his Debts, 157
 Infant Executor assents to a Legacy, it is no good assent if there be not other Assets for Debts, 257

Interest.

Interest to be considered as it was at the time of the Contract, and not at the time of the Creation, 211
 Mortgagee forfeit shall have Interest for his Interest, 258

Jointure.

The word (*Jointure*) in an Agreement implies that the Husband shall have an Estate for life as well as the Wife a Jointress paying off a Mortgage, decreed to hold over till she be fully satisfied, 272

Interrogatories.

Council ordered to have a sight of the Interrogatories to which the Defendant was to be examined, 66

Judgment.

Bond and Judgment upon it: Monies paid before actual entering of the Judgment is to be taken as paid upon the Bond, tho' the Judgment be of a Term before payment, 24
 Where and in what Case Judgment on a Bond is worse Security than a Bond only, *ibid.*
 Judgment for a Matter discharged by Act of Oblivion decreed to be vacated, 55

The TABLE.

L

Lease. Vide Term. Perpetuity.

WHether a Lease may be said in possession out of a Reversion, 18

Lease for more years than the Lessor had power to make, shall be good for so many years as he had power for, 23

Leases are Assets to pay Debts notwithstanding the assent of the Executor to the devise of them, 257

Legacy.

The nature of a Legacy, 252
The Testators Estate in whose Hands soever liable in Equity to his Legacies, 57

Legacies paid by colour of a Will, which is after found to be revoked, allowed, 126

Legacies payable at the age of twenty one, and no provision for Maintenance in the mean time, 66

Where Legatee shall refund for want of Assets to pay Debts, 126

Where the Legacy on condition the Legatee marry with consent, is recoverable in Equity, notwithstanding the Breach in the Condition, and where not, 140

Legatees to abate in proportion where there is not enough to pay all, 149

Executor not bound to pay a Legacy without Security to refund in case of defect of Assets, 149, 257

The Childs Legacy paid to the Father, who failed, the payment

decreed good, the Legacy not bearing the charge of a Suit, 245
Legacy not attachable by Foreign Attachment, 257

A Sum of Money given to one to dispose as the Testator should appoint by a Note, who dies without such appointment, is a good Bequest to the Party, 198. and the Testator did not intend it should come to the Executors, *ibid.*

Letter of Attorney.

Letters of Attorney and Livery of Seisin supplied in Equity, 241

Limitation.

Limitation of Estates.

The limitation of a Remainder in possibility of a Term, to the Heir of the Person limiting, is a void Limitation, 8

On a void Limitation the Estate reverts to the Lessor, *ibid.*

Limitation of the Trust of a Term to one is good to his Executor, *ibid.*

Limitation to Heirs Males taken in Equity as a Limitation to the first Son, 146

A defective Limitation in Point of Law supplied in Equity, *ibid.*

An Use limited to Baron and Feme, and after to their Issue, they then having none, is all one as if limited to them and the Heirs of their Bodies, and the Issue takes nothing as a Purchaser, 166

The Interest of a Lessor to supply Power if that be defective, 9
Statute.

The TABLE.

Statute of Limitations.

A Trust is not within the Statute of Limitations, 20, 28
Exception in the Statute of Limitations as to the Merchants Accounts extends not to Inland Merchants, 152

Lunatick.

Bargain by a Lunatick eight years before the Lunacy found, avoided by being fain'd a Lunatick with a retrospect of seventeen Years, yet the Party admitted to traverse the Inquisition, 113
Generally a Lunatick ought to be made a Party, *ibid.*
Where a Lunatick must be a Party to a Suit for his own benefit, *aliter* in case of an Ideot, 153
Where a Lunatick shall be Party to an Information on his behalf, and where not, *ibid.*

London. Custom. Vide Diphon.

M

Marriage.

Marriage a good consideration to make a Feme a Purchaser, 99

Mortgage. Equity of Redemption.

The nature of a Mortgage, 285
A Poll Agreement after a Conveyance cannot make it a Mortgage, if not at first, 2

Assignment of a Mortgage, the Mortgagee ordered to account before Assignment and after, 3
Mortgagee after Forfeiture assigns the Mortgage for his due Debt, he is decreed to account for the whole time, both before and after the Assignment, and this without the Assignee being a Party to the Decree, because Outlawed, and that pleaded against him, 3

A Mortgagor refusing to receive his Money on Tender after Forfeiture, shall lose his Interest from the Tender. 29

Executor of the Mortgagee ought to be a Party where the Heir was to have the Money paid, or the Mortgage fore-closed, 51

Mortgagee remits by his Will part of the Mortgage Money, and all the Interest if the rest be paid in three Years, the Mortgagor failing to pay in 3 Years time, loseth the benefit of the Equity, 52

Voluntary Conveyance precedent void, *quoad* a Mortgage subsequent prevailed so as to pass the Equity of Redemption, 59

All Money really due and paid by the Assignee to the Mortgagee, to be taken as principal against the Mortgagor from the time of the Assignment, 68

Whether the Mortgage Money belongs to the Heir or Executor of the Mortgagee, 88

If there be no defect of Assets in the Executors Hands, the Heir shall have the Money, 285

Mort.

The TABLE.

- Mortgage by way of Counter-security for 400 l. entred into Bonds, shall extend to be a security for 2000 l. more for another Debt on Bond entred into, though there was no Agreement that the Bond should be a Security for the 2000 l. if the Plaintiff will redeem he shall reimburse and save harmless against the 2000 l. 22
- Mortgages above 20 Years not redeemable, 102
- Mortgagee that comes in at an old hand shall not account but so far only as goes in discount of his Money, but not for the Surplusage, 102
- Mortgagee of an Estate for life on an old Mortgage shall not account for more than the Estate had been worth to be sold, without respect to the benefit that hath hapned by the continuance of the Plaintiff's life, 109
- Yet upon Appeal in Parliament ordered otherwise, *ibid.*
- Where a Mortgagee lent new Money on the old Security without notice of an Intervening Settlement, shall be allowed it, 119
- Mortgagee without notice of a precedent Incumbrance, buys in an Incumbrance precedent to that, he shall not be impeached in Equity, but on payment of what is due to him on both Estates, 150
- Whether a Mortgagee shall protect his Mortgage by Incumbrance bought in against a Title he had notice of before, and under which the Party was then in possession, 166
- A Mortgagee may protect himself by getting in an old Incumbrance tho' nothing be due upon it, *ibid.* 166
- Whether a Mortgagee buying in Incumbrance that chargeth other Lands also, shall be restrained from his legal course to reimburse him the Money paid for that Incumbrance, so as he use it only to protect his Mortgage, 167
- A money Mortgagee buying in precedent Incumbrance, shall hold against a middle Mortgagee till both are satisfied, 201
- Or where a Mortgagee buying in a precedent security of the Lands in his Mortgage, and other Lands, shall hold all against a middle Mortgagee of all those Lands till all due to him on both Securities be satisfied, 202
- Whether a Statute bought in by a Mortgagee ought to be used as to Lands not in his Mortgage, 166
- An old Mortgage assigned to another ought to be taken as a new Mortgage from the time of the Assignment, 218
- Tenant for life shall contribute with the Reversioner towards the Arrears of a Charge or Mortgage, 223
- Lessee of a Prebend mortgageth the Lease, and after the day pays the Money, and then surrenders and takes a Lease of the Prebend, he hath good Equity against the Mortgagee, 228. If the Prebend die Equity shall not make ad Lease good against the Successor, *ibid.*

The TABLE.

Mortgage forfeit shall have Interest for his Interest, 258
 Mortgage assigns, the Assignee shall have Interest for his Interest then due, *ibid.*
 A Copyholder having for money agreed to mortgage Lands stands trusted for the Mortgagees, 171
 Difference between the Heir of a Mortgagor being relieved upon the personal Assets, and a Trustee in such Case, 271
 Tenant for Life decreed one third, and he in Remainder two thirds to redeem, *ibid.*
 A Joyntriss paying off a Mortgage decreed to hold over till she be satisfied, 272
 Mortgage of an Inheritance to a Citizen of London part of his personal Estate, 285
 Mortgage lookt upon as part of the personal Estate, 286
 Difference between a Mortgage and an absolute Conveyance with a collateral Agreement to reconvey, *ibid.*
 The second Mortgagee bound by Account between the first Mortgagee and Mortgagor, 299
 None can come to redeem a Mortgage when the Mortgagee cannot compel the Mortgage money, and the remedy ought to be reciprocal, 3
 A voluntary disposition of an Equity of Redemption not to be favoured, 219
 An Equity of Redemption intailed tends to make it a Perpetuity, *ib.*
 An Equity of Redemption not intailable within the Statute, *ibid.*
 Equity on Equity not favoured, for by it legal Settlements are destroyed, *ibid.*

Equity of Redemption carried too far, 219
 Antiquity a Cause to deny Redemption, 220
 A Decree to foreclose Tenant in Tail from redeeming concludes his Issue and the Remainder, *ibid.*
 Diversity between parties to the Mortgage coming to redeem and Strangers, *ibid.*
 A Decree to foreclose the Money, *Vide Decree,*

N.

Ne exeat Regnum.

THE Nature of a *Ne exeat Regnum*, 115
Ne exeat Regnum lies for a private matter without a Bill, 116

Notice.

The Defendant not charged with the Notice of the Trust of Land which he had got a Conveyance of; he pleads he had no Notice, a good Plea, 34
 Notice of an Incumbrance any time before the Conveyance executed shall bind a Purchaser, though he had no notice at the time of the Agreement or Contract, 34
 Notice to him that purchaseth for another, shall affect the Purchaser himself, 33
 Whether Notice be necessary to be given of a Condition annexed to an Estate to the person to whom the Estate is given, 143
 Plea, Notice, 232
 A new Bill after dismissal on hearing on suggestion of Notice which was not in Issue in the former Cause, 252
 Notice

The TABLE.

Notice not denied, yet in Issue,
and not proved, after hearing
may have the Defendants Oath
on a new Bill, 252
Recital of the Deed which doth re-
fer to the Incumbrance is Notice
against a Purchaser, 291

Oath.

WHere Oath must be made of
the want of a Deed, Bond,
&c. 11
Vide tit. Deed.

Plea of Outlawry put in without
Oath, 258

Office.

An Office extendible at Law or E-
quity, 39

Orphan.

The Portion of an Orphan in Lon-
don is of such a nature, that if the
Husband dye, his Widow, and
not his Executor shall have it, 182
A Citizen of London cannot devile
his Childs part over to another,
in case his Child die in Minority,
199

Mortgage of an Inheritance to a Ci-
tizen of London is part of his per-
sonal Estate, and to be divided
according to Custom, 285

Whether the Estate which a Citizen
hath as Executor to another, and
residuary Legatee, be lyable to
the Custom, 310

P.

Parliament.

PRivilege of Peers in Parlia-
ment when it commenceth,
and when it ends, 221

When the Parliament (according to
Rule) cannot relieve in a just
Cause the Parliament will give
special direction for Relief, 205

Payment.

Where one placeth Money in a Scri-
vener's hands with this general
Trust for him to put it out where
he pleaseth, there by that general
Trust or Authority the payment
back to the Scrivener is good pay-
ment; but if the Lender keep
the Security himself, *aliter*, 93, 111
Security of Purchase Money is pay-
ment, 99

What is good proof of payment of
money against a Purchaser, 119

Perpetuity.

Limitation in Reversion to several
Sons in being doth not tend to
the creation of a Perpetuity; *ab-*
iter if to a person not in being, 8

The definition of a Perpetuity, 213

Limitation of the Trust of a Term
to Husband and Wife and the
longest liver of them for life, and
after to the eldest Issue of them,
none being then born, is a good
Limitation. It cannot be a good
Limitation beyond two Limita-

tions to a third person not in be-
ing, 33. And Limitation to Baron
and Feme is to be accounted as
one Limitation in the Trust of a
Term, *ibid.*

Limitation of a Term, and being a
remote Trust and tending to a
perpetuity is void, 230

What Contingent Remainder of a
Term is not a perpetuity, 239

Plea.

Plea. Jurisdiction of the Dutchy
over-ruled without Costs, 41

The

The TABLE.

The thing being for a Personal Estate, the Court over-ruled the Plea of the County Palatine, 41
 Jurisdiction of the County Palatine allowable between Parties dwelling in the same County, and for Lands there, and for Matters local, *ibid.*
 A Scholar of the University was sued, the Chancellor puts in his Claim of Priviledge by Writing, but disallowed, 237
 Plea over-ruled with this that the Plaintiff proceed no farther than Answer, without leave of the Court, 262

Presumption.

The Rule for Presumption, 201

Power.

One hath power to make a Lease in possession for 21 Years, and he makes a Lease to C. for 21 Years, to secure him from Debt, for which he was bound with him, but the Lease was void in Law as being made to commence at a day to come. C. died and left no Assers, and the Plaintiff preferred a Bill for the Debt; tho' the Lease be not good in strictness of Law, yet it did amount to a good Declaration of her power in Equity to make the Lease for 21 Years, and the receipt of the Profits was under limitation of that power, 10
 Feme Sole seised of a Reversion after life, settles the Land to the use of herself for life, the Remainder in Tail, with power for her Sole, to make Leases for 21 Years in possession, she marries, and she and her Husband make

Leases for 21 years (living Tenant for life) to commence from the date, the power is not pursued,

Diversity between a naked power as a power is given by a Will to a Feme to sell Lands, tho' she marry she may sell; and a power that flows from an Interest, as in case of a Settlement, 17
 18

Whether the Legal defect of the execution of a power may be supplied in Equity, 104

Whether if a Man that hath only power to charge Lands, conveys or mortgages them for so much as he hath power to charge them, shall be enforced in equity to execute his power to the same person, 104

A power to charge Lands is not destroyed by a Mortgage or Conveyance which is by Lease and Release, *aliter* if by a Fine or Feoffment, 105

A defective execution of a power raised by a voluntary Conveyance without help in Equity, 160

Power to raise a Lease by Covenant to stand seised is not good, 161

A power not pursued, decreed, 263
 Power not observed in circumstances decreed, 264

Power to sell Lands subject to the Rules and Laws of Equity, 281

Portion.

Condition annex to the Gift of a Portion, as provided she marry with the consent of A. is but in *terrorem*, and shall not defeat the Portion, *aliter* if the Portion had been limited over to another, 22

Pur.

The TABLE.

Purchase. Purchaser. Vide Notice.
 Its the constant course in Chancery,
 that if a Purchaser *bona fide* do
 buy in an eigne Incumbrance, Sta-
 tute or Judgment, and there was
 a Judgment mesne between that
 and his Purchase, of which he
 had no notice at his Purchase,
 that he shall protect his Purchase
 with the eigne Incumbrance so
 brought in, 36
 Purchaser shall not be affected in
 Equity by a Judgment without
 expreis notice of it before his Pur-
 chase, 37
 Vendor after Contract to purchase,
 stands trusted for the Vendee, 39
 In what cases a Purchaser without
 notice is not prohibited, 247

R.

Recovery.

A Wilful Forfeiture by suffer-
 ing a Recovery in Point of
 Law, supplied and holpen in E-
 quity, 49
 Recovery subsequent for a collateral
 purpose, shall enure to make good
 precedent Estates, 120

Reference.

Solicitors assent to Interlocutories
 may bind, but not to a final Re-
 ference, 86

Release. Vide Mortgage.

A Release set aside by a subsequent
 Accident having relation to the
 Original Equity, 46
 A. posselt of a Term for Years, pur-
 chaseth the Fee, and then settles
 it on his Wife, a Joynture, and

dies, the Wife releaseth all her
 right to the Personal Estate to
 the Executors, and afterwards
 the Fee is evicted, and notwith-
 standing the Release, the Wife
 decreed to hold during the term,

47

Release of Equity of Redemption,
 a Bill in the Lords House to be
 relieved against it, 107

Remainder. Vide Perpetuity.

Limitation of Personal Chattels to
 one during life, the Remainder
 to another, in what Cases good,

130

When the Trust of a Term is to one
 for life, the Remainder for life,
 the Remainder to a third Person
 if he out-live Tenant for life, the
 Remainder to another and his
 Heirs, that Remainder to the third
 Person, he dying before Tenant
 for life doth not vest it in his Ex-
 ecutors, 132

Rent.

Apportionment of Rent in Equity,
 where it cannot be in Law, 32

As upon a Right of Common reco-
 vered, which is on Eviction of
 the Land in Law, *ibid.*

Remedy in Equity for a Rent when
 remedy in Law is not sufficient,

79

Rent Seck without Seisin recovera-
 ble in Equiry, *ibid.*

Seisin decreed of a Rent Seck, 147

The Person made liable to Arrears
 of Rent, with which he was not
 chargeable at Law, 80

Whether Tenants held out by force
 of Soldiers in the time of War,
 shall for that time be relieved in

Z z

Equiry

The TABLE.

Equity against payment of the Rent, 84
 A Rent, and the Arrears of it decreed (the Deed being lost) because it did not appear what kind of Rent it was, 120
 Where Rents taken by colour of a Title that is avoided, the Receiver shall be accountable as a Bailiff, 126
 A Rent which chargeth only the Land not to be decreed in Equity against the Person, 145
 Confusion of Bounds of Lands, out of which a Rent-charge issues, is proper matter for relief in Equity, 146
 Fraud to hinder a Distress for Rent where tried, 147
 The Person is not to be subjected in Equity to a Rent, 185
 No relief in Equity for a Rent of which the Plaintiff hath Seisin, *ibid.*
 Vendor of Lands takes a Lease of them at such a Rent, with condition of Re-entry, and gives collateral security for the payment of the Rent, and a Re-entry. The Vendor could have no relief against the collateral security without payment of the Arrears, 261
 Tenant and Seisin of Rent admitted at a Trial, 269
 A Rent-charge in what cases not extinguished, 273

Revocation.

A Conveyance for Years is not a Revocation of a Devise in Fee, but *pro tanto* only, 185

S.

Sale.

TO raise out of the Profits in what case it implies a Sale, 240

Security.

He that takes security by a penalty, ought not to have more, 24

Sequestration.

Sequestration against Land and Goods, tho' the thing decreed was a personal Duty, 92
 Sequestration a necessary Process of the Court, *ibid.*
 Sequestration against the Heir, 241
 The power of Chancery as to Sequestration, 92

Sewers.

Sewers accounts the Chancery will not meddle with, 232
 Difference between Commissioners of Sewers and Commissioners of Bankrupts, *ibid.*

Solicitor.

Solicitor to pay the Costs when the Party absents himself, 71
 Solicitors assent to Interlocutories, may bind, but not to a final Reference, 86

Statute.

Statute lost not to be helped by motion, but by Bill against all Parties, 270
 Antiquity of a Statute answered by being proved, and Interest paid, 304

Out.

The TABLE.

Subpena.

A *Subpena* no Record, nor ought to be demurred unto, 50
Subpena served on a Defendant here, ordered to be good Service for the other Defendant beyond Seas, 67

T.

Tail. Vide Trust.

Conveyance by Tenant in Tail supplied, 240
 Tenant in Tail bound by his Agreement to convey, 171
 Vide Agreement.

An Intail in Equity (not in Law) whether the Issue shall be bound by the Agreement of his Father without Fine, 234

Tithe.

A Rate Tithe is not to be decreed in Chancery. 187

Trust.

Where any Person hath the Trust of a Possibility in remainder of a Term, he hath good power to declare and make a Disposition of the Trust of such possibility, 8, 9
 The Father joins the Son with him in the Purchase, it shall not be presumed a Trust in the Son, except it be expressly declared, 28
 Whether Tenant in Tail of a Trust, the Remainder in Tail to another, if the Tenant in Tail by suffering a Recovery, that Recovery shall bar the Remainder which is no settled Interest vested, 68. By *Bridgman* it shall not.

If Trustee of a Term surrender and take a further Term, that shall be for the benefit of *Cestuy que Trust*, 191

Where a Trustee for Sale of Lands for payment of Debts to the value of the Lands, thereby he becomes a purchaser himself, 299

Cestuy que Trust of a Surplus hath but a bare possibility, and cannot sell, 208

If a Trust be for payment of Debts it may support a Conveyance, otherwise not, 249

Trust for payment of Debts generally, good against an Heir tho' no Creditor be party: But not so against a Purchaser, *ibid.*

Trustee of a Term after assent of the Executor sells it *bona fide*, if good against a Creditor, 257

A Trust of Land no Assets, 228

Fine and Nonclaim bars a Trust, 268

Entry on the Land by a *Cestuy que Trust* is no sufficient Claim, *ibid.*

Father purchaseth in the name of a Son unadvanced, it is an Advancement, not a Trust, 296

Lands settled in Fee on Trust to sell so much as the Trustees should think fit for payment of Debts and Legacies, and the Overplus to his Daughter and her Executors.

1. Whether the Trustees can sell more than is sufficient.

2. The Daughter being dead *sans* Issue, whether the Lands belong to her Administrator or to her Heir, 280

Trust for raising a Sum of Money on a Term which happens to be void, transferred by another Term whereon the Grantor had power 20

The T A L B E.

to charge it, 287
 Trust by Deed interpreted to be satisfied by the Lands of a bad Title, though the Deed of Trust be of an indefeasible Title, 298
 Trust of a Freehold for Life decreed to the Heir, 311
 A Trust decreed for a person who in his Answer on Oath in another Cause had denied the Trust, because drawn in to answer by Fraud, 134
 A Trust to pay Portions out of Rents and Profits at prefixed days gives Trustees power to sell, 176

V.

Use.

USE upon an Use will not rise by Bargain and Sale, 114
 Whether an Use upon an Use in a Deed inrolled be to be supported in Equity as a Trust, 115
 Limitation of new Uses good though the express power be only to revoke, 241

W.

Warranty.

Relief for one who had entred into a general Warranty, where he intended but against himself only, and this after Eviction, 15

Will. Vide Devise, Legacy, Executors.

By the Devise of the Moiety of a personal Estate, the Moiety of a Lease passeth, 16

Lands contracted for by a Purchaser pass by a Devise of the Purchaser, 39. If upon Articles for a Purchase, the Purchaser dies and deviseth the Lands before the Conveyance executed, the Land passeth in Equity, *ibid.*

A perpetual Injunction awarded against the Defendant not to prove a Will touching a personal Estate only in the Prerogative Court, 80

A Devise of the Profits till a Child comes to one and twenty years of Age is a good Devise of a Term till the Child would be one and twenty, though he dye before, 114

A Nuncupative Will is not pleadable in any Court before Probate, 192

All my Estate in a Will passeth a Fee, 262

Witnesses.

A special Commission to examine a Witness upon Oath that he was surprised, not allowed, 25

Witnesses formerly examined in another Court (as in the Exchequer) not to be examined in Chancery, 233

F I N I S.

